SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 18

UTAH PIE COMPANY, PETITIONER,

vs.

CONTINENTAL BAKING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

VOLUME 1

	Original	Print
Proceedings in the United States Court of Appeals for the Tenth Circuit		
Appellant, Continental Baking Company's statement of points relied upon, Case No. 7306	1	2
Statement and Certificate of Continental Baking Company required by Rule 14(10), Case No. 7306	5	6
Appellant, Carnation Company's statement of points relied upon, Case No. 7308	6	7
Statement and Certificate of Carnation Company required by Rule 14(10), Case No. 7308	10	11
Appellant, Pet Milk Company's statement of points relied upon, Case No. 7309	10	12
Record from United States District Court for the District of Utah, Central Division	15	16
Complaint	15	16
Carnation Company's interrogatory No. 20 to plaintiff	19	21
Answer to interrogatory No. 20 of Defendant, Carnation Company	19	21

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 25, 1966

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Answer of Pet Milk Company to complaint	20	22
Answer of Carnation Company to complaint	22	24
Reply of Utah Pie Company to Counterclaim of Continental Baking Company	23	26
Motion for production of documents	24	27
Amended answer of Continental Baking Company to complaint	25	28
Amended counterclaim of Continental Baking Company	28	31
Pretrial order, August 31, 1962	30	34
Continental Baking Company's motion for partial summary judgment and severance	32	36
Carnation Company's motion for partial summary judgment and severance	33	37
Motion of Utah Pie Company for leave to add additional issue	34	38
Minute entries, January 4, 1963 & January 21, 1963	34	39
Order on motion for production of documents	36	40
Verdict as to Continental Baking Company	36A	41
Verdict as to Pet Milk Company	36	41
Verdict as to Carnation Company	37	42
Verdict on conspiracy	37	43
Minute entry of February 22, 1963	38	44
Judgment on counter-claim	38	45
Judgment	39	45
Decree	40	47
Stipulation	41	49
Affidavit in support of attorneys' fees	42	50
Motion of Carnation Company for judgment notwithstanding the verdict or for a new trial	42	50
Motion of Carnation Company to alter or amend the decree and to suspend the injunction	44	52
Defendant Pet Milk Company's motion for judgment in accordance with motion for directed verdict, and in the alternative, for new trial	46	54

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Pet Milk Company's motions to alter or amend the decree of injunction and to suspend the injunction	47	56
Minute entry, March 4, 1963	49	58
Judgment	49	59
Notice of appeal by Carnation Company	50	60
Notice of appeal by Pet Milk Company	51	61
Notice of appeal by Continental Baking Company	51	62
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963	52	63
Appearances	52	63
Statement by Mr. Alioto for the plaintiff	52	63
Testimony of William Ross Kitchin—		
direct	58	69
cross	72	87
redirect	82	100
recross	101	122
redirect	107	129
Stanley Edward Chapman—		
direct	109	131
Colloquy between court and counsel	113	136
Testimony of Stanley Edward Chapman—		
direct	121	145
cross	144	178
redirect	178	222
recross	183	229
Grant R. Caldwell—		
direct	187	233
Voir dire examination	191	238
Testimony of Grant R. Caldwell—		
direct	193	241
Voir dire examination	201	249
Testimony of Grant R. Caldwell—		
direct	206	255
Voir dire examination	212	257

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Testimony of Grant R. Caldwell—		
cross	221	266
Roy M. Anderson—		
direct	225	269
redirect	229	274
recross	230	275
Duane S. Halvarson—		
direct	230	275
Colloquy between court and counsel	232	277
Testimony of William R. Kitchin—		
(recalled)—		
direct	243	285
cross	250	296
redirect	251	297
Grant R. Caldwell—		
(resumed)—		
cross	257	301
redirect	279	324
Grant R. Caldwell—		
recross	283	328
cross	285	330
redirect	321	376
George D. Wohlhueter—		
direct	331	380
Voir dire examination	356	406
Testimony of George D. Wohlhueter—		
direct	356	407
Charles V. Bye—		
direct	402	440
Voir dire examination	408	447
Testimony of Ralph F. Murphy—		
direct	409	449
cross	427	466
Voir dire examination	431	470

	Original	Print
Record from United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Testimony of Ralph F. Murphy—		
cross	432	471
redirect	432	471
Myron K. Rigby—		
direct	437	475
cross	439	477
Ross K. Rigby—		
direct	442	481
cross	446	487
redirect	454	495
cross	456	498
Deposition of H. Larkin Osborn read into record—		
direct	458	500
VOLUME 2		
Testimony of Bryant K. Rigby—		
direct	464	505
cross	465	506
redirect	473	517
Myron K. Rigby— (recalled)—		
direct	475	518
cross	476	519
Gaylen S. Rigby—		
direct	481	522
Voir dire examination	515	562
Testimony of Gaylen S. Rigby—		
direct	520	568
Grant Caldwell— (recalled)—		
direct	523	570
Voir dire examination	524	571

	Original	Print
Record from United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Testimony of Grant Caldwell—		
direct	527	574
Voir dire examination	533	579
Testimony of Grant Caldwell—		
direct	534	581
Voir dire examination	535	582
Testimony of Grant Caldwell—		
direct	536	583
cross	541	588
Motions and the Court's reservation on ruling	556	603
Testimony of Herbert James Zimmerman—		
direct	557	604
Voir dire examination	558	605
Testimony of Herbert James Zimmerman—		
direct	559	607
Voir dire examination	569	613
Testimony of Herbert James Zimmerman—		
direct	570	614
cross	571	615
Voir dire examination	582	628
Testimony of Thomas Edward Hereford—		
Voir dire examination	582	629
Testimony of Thomas Edward Hereford—		
cross	587	636
redirect	594	645
recross	595	647
Duane S. Halvarson—		
direct	596	648
Voir dire examination	610	667
Testimony of Duane S. Halvarson—		
direct	611	668
cross	613	670
redirect	614	671
recross	624	685

	Original	Print
Record from United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Testimony of Duane S. Halvarson—Continued		
redirect	627	688
recross	629	691
redirect	630	691
Leonard Henske—		
direct	630	692
cross	639	702
redirect	644	708
Elmer Degenhardt—		
direct	647	709
cross	660	726
redirect	666	733
recross	669	737
redirect	670	739
Duane S. Halvarson— (recalled)—		
cross	670	739
redirect	671	740
recross	671	741
Doil Smith—		
direct	672	742
cross	680	752
redirect	686	759
Herman Taylor—		
direct	687	761
cross	688	762
redirect	689	764
recross	692	766
redirect	698	768
Gaylen S. Rigby—		
direct	698	769
cross	783	877
redirect	789	885
recross	791	887

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Testimony of Donald Edwin Andersen—		
direct	795	891
cross	796	893
Carrington Shields—		
direct	796	893
George D. Wohlhueter—		
direct	802	894
cross	822	913
redirect	831	920
Boyd Frederick Schenk—		
direct	833	921
cross	836	926
redirect	856	949
David Theodore Dittman—		
direct	857	950
cross	858	951
redirect	868	962
recross	868	963
Darrell J. Nord—		
direct	868	963
cross	882	976
redirect	888	981
George D. Wohlhueter— (recalled)—		
direct	889	982
Voir dire examination	894	986
Testimony of George D. Wohlhueter—		
cross	897	987
Herbert James Zimmerman— (recalled)—		
direct	905	996
Voir dire examination	909	997

VOLUME 3

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Testimony of Herbert James Zimmerman—		
Voir dire examination	911	399
cross	915	1001
William N. Harsha—		
direct	922	1008
cross	944	1032
Shelby A. Robert, Jr.—		
direct	967	1056
Roice H. Anderson—		
direct	970	1057
Voir dire examination	974	1062
Testimony of Roice H. Anderson—		
direct	977	1065
Voir dire examination	978	1066
Testimony of Roice H. Anderson—		
direct	980	1067
Colloquy between court and counsel	983	1068
Testimony of Roice H. Anderson—		
Voir dire examination	988	1071
Colloquy between court and counsel	993	1074
Testimony of Roice H. Anderson—		
direct	998	1078
Voir dire examination	1006	1087
Testimony of Roice H. Anderson—		
direct	1011	1090
Voir dire examination	1014	1094
Testimony of Roice H. Anderson—		
direct	1017	1099
cross	1027	1108
Alan Walter Stewart Young—		
direct	1052	1136
cross	1055	1140

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Testimony of Charles V. Bye—		
direct	1071	1163
Voir dire examination	1077	1167
Ralph F. Murphy—		
direct	1078	1169
Voir dire examination	1080	1170
Ralph F. Murphy—		
direct	1081	1171
cross	1087	1178
Melbourne E. Wright—		
direct	1090	1182
cross	1091	1181
Donald G. West—		
direct	1092	1185
cross	1098	1194
S. Alfred Halgren—		
direct	1101	1196
cross	1111	1209
Robert Muth—		
direct	1124	1225
Voir dire examination	1125	1226
Motion by counsel for Utah Pie Company to amend the complaint and granting thereof	1126	1228
Argument on behalf of Utah Pie by Mr. Alioto	1127	1229
Argument on behalf of Continental by Mr. Schafer	1171	1282
Argument on behalf of Pet by Mr. Lamb	1193	1310
Argument on behalf of Carnation by Mr. Billings	1209	1329
Additional argument on behalf of Utah Pie by Mr. Alioto	1216	1337
Court's instruction to jury	1228	1345
Exceptions to certain instructions	1252	1373

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Excerpts from transcript of proceedings, February 4, 1963-February 23, 1963—Continued		
Additional Court's instructions to jury and exceptions	1264	1385
Verdicts	1283	1405
Colloquy re attorneys' fees, judgment, etc.	1284	1407
Defendants' proposed instructions to jury	1300	1422
Defendant, Pet Milk Company's requested additional instructions	1318	1445
Defendants, Continental Baking Company's and Carnation's Company's requested additional instruction	1320	1446
Note to Court from jury	1321	1448
Clerk's certificate (omitted in printing)	1321	1448
Proceedings in the United States Court of Appeals for the Tenth Circuit	1323	1449
Order granting motions to stay injunction, and injunction stayed pending appeal until further order of court	1323	1449
Opinion, Phillips, J.	1325	1450
Judgment	1449	1526
Clerk's certificate (omitted in printing)	1450	1526
Order allowing certiorari	1451	1527

VOLUME 4

Record from the United States District Court for the District of Utah, Central Division		
Plaintiff's Exhibits	1453	1529
1—Annual Report of Continental Baking Company for the year 1960 (excerpts)	1453	1529
4—Utah Pie Company—IBM listing of frozen pie sales by flavor (8" pie only)	1455	1530
5—Carnation Company—Frozen Foods Division Budgets—1958-1962	1581	1656

VOLUME 5

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
5—Carnation Company—Frozen Foods Division Budgets—1958-1962—Continued		
6—Carnation Company—Frozen Foods Division—Territorial Profit and Loss Statements—1958-1962	1754	1829

VOLUME 6

7—Pet-Ritz Foods Division, Pet Milk Company, Beulah, Michigan, Profit or Loss Statement on Pet-Ritz Fruit Pies for years, 1957-1961—Actual and Budgeted for Sales Divisions	1851	1926
7A—Pet Milk Company, Salt Lake City Sales Division, Actual and Budgeted Pre-Tax Losses on Fruit Pie Sales, 1958	1971	2047
7B—Pet Milk Company, Salt Lake City, Pet-Ritz Foods Division, Actual and Budgeted Pre-Tax Losses on Pet-Ritz Pies—Retail 1959	1973	2048
8—Morton Price Advice No. 32W, Morton Price List effective September 4, 1961 in States of California, Arizona, Washington, Oregon, Utah, Montana, Nevada and Idaho	1975	2049
9—Morton Price Advice No. 48, Morton Price List effective September 4, 1961 in the territory East of Rockies	1976	2050
10—Morton Frozen Foods invoice to Fox Markets, Los Angeles, dated July 7, 1961, and invoice to American Fd. Stores, Ogden, Utah, dated July 6, 1961	1978	2052
11—Morton Frozen Foods invoice to American WHSLE Groc., Seattle, dated July 6, 1961	1980	2054
12—Morton Frozen Foods invoice to American Food Strs., Ogden, Utah, dated July 6, 1961	1981	2055

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
13—Morton Frozen Foods invoice to United Grocers, Oakland, Calif., dated July 20, 1961	1982	2056
14—Morton Frozen Foods invoices to Grocers WHLSE, Salt Lake City, dated July 28, 1961; Associated FD Stores, Pocatello, Idaho, dated July 21, 1961; Associated FD Stores, Salt Lake City, dated July 26, 1961; and Safeway Stores, Salt Lake City, dated June 29, 1961	1983	2057
VOLUME 7		
15—Printed form of Safeway Stores, Inc. for offer of Merchandise—Morton pies—dated June 16	1987	2061
16—Morton Price Advice No. 31W & Supplements, Price List effective July 3, 1961 effective in states of California, Arizona, Washington, Oregon, Utah, Montana, Nevada and Idaho	1988	2062
17—Invoices of Parkway Foods, Inc., Watsonville, Calif. to Morton Frozen Foods for period of February 24, 1961 thru December 30, 1961	1994	2068
18—Letter from Morton Frozen Foods to Del Mar Foods Company, Watsonville, Calif., attention Allen Smith, dated November 21, 1960 and accepted date of December 23, 1960	2080	2154
19—Letter from Morton Frozen Foods (George A. Nightingale), to Frozen Food Marketers, Murray, Utah, dated November 22, 1960	2082	2158
20—Memorandum from D. J. Nord to John Bittner, "Group Tie Ups", dated January 13, 1959 with report on "Pet-Ritz Pumpkin and Mince Group Tie Ups, 1958, Salt Lake Division"	2083	2159

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
21—Pet Milk Company—Summary of operations—Frozen Fruit Pies for Salt Lake Division, San Francisco Division and All Sales Divisions—1958 and 1959 for Pet Brand, Pet-Ritz Brand and Swiss Miss Brand—1960 to August 31, 1961	2085	2161
22—Carnation Company—Summary of Territorial Profit and Loss—Frozen Fruit Pies for Pacific Northwest Mountain States, Southern California, Northern California and Total Western Division—Years 1959, 1960 and 1961	2090	2167
23—Continental Baking Company—Morton Frozen Foods Division (Pies) Analysis of Operations—1958, 1959, 1960, 1961, Region VIII Through 1960 and Region W—1961, Region VII Through 1960, and Region I—1961	2098	2175
24—Pet Milk Company—Comparison of Net Sales Price Per Dozen in the Salt Lake Division with Net Sales Price Per Dozen in All Other Sales Divisions	2101	2178
25—Pet Milk Company—Comparison of Gross Sales Price and Net Sales Price Per Dozen for Pet-Ritz Brand Pies Between Salt Lake Invoices Furnished and Total Sales by Pet Milk Company	2103	2179
26—Carnation Company—Frozen Foods Division—Comparison of Pacific Northwest Mountain States Division Operations With All Other Frozen Food Division Operations	2105	2180
27—Pet Milk Company—Study Indicating Computed Net Profit or (Loss) Per Dozen of Apple, Cherry, Boysenberry and Peach Frozen Pies Based on a Weighted Average Product Mix and Absolute Net Prices	2107	2181

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
28—Carnation Company—Study Indicating Computed Net Profit or (Loss) Per Dozen of Apple, Cherry, Boysenberry and Peach Frozen Pies Based on a Weighted Average Product Mix and Absolute Net Prices	2110	2184
29—Continental Baking Company—Study Indicating Computed Net Profit or (Loss) Per Dozen of Apple, Cherry, Boysenberry and Peach Frozen Pies Based on a Weighted Average Product Mix and Absolute Net Prices	2113	2187
30—Pet Milk Company—Frozen Foods Division—Annual Standards Fresno Plant, Years 1958-1962 for Peach, Apple, Boysenberry, Cherry, Pumpkin, Mince, Pet-Ritz and Swiss Miss pies	2116	2190
31—Summary of Annual Sales and Net Income Before Taxes From Annual Reports of Defendants and Available Frozen Pie Volume and Profit or (Loss) Before Taxes In Certain Competitive Areas with Utah Pie Company	2128	2202
32—Cost Estimate—24 oz Bel Air Fruit Pies, May 22, 1961 and Cost Breakdown—Morton 22 oz Fruit Pies, Watsonville Plant, May 22, 1961	2129	2203
33—Memorandums dated June 20, 1957 and June 28, 1962 entitled CO- Packing, Co-Packing Arrangements with Morton Pies	2130	2204
35—Morton Frozen Food Invoices to Safeway Stores, San Francisco, July 21, 1961 and August 7, 1961; A. N. Lewis Co., Northridge, Calif., August 2, 1961 and Jerseymaid Milk Prod., Los Angeles, August 14, 1961	2131	2205

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
36—Management Report—November on Competitive Activity—Frozen Pies, dated December 17, 1958	2135	2209
37—Management Letter—August 15 Through September 15 to J. A. Dodge from H. A. Beasley and D. J. Nord, dated September 15, 1959	2136	2210
38—Memorandum from Boyd F. Schenk to D. T. Dittman, dated July 19, 1960, subject "Visit to Utah Pie Company, June 23, 1960"	2137	2212
39—Memorandum from Wilson A. Hall to Miss Eunice Cox, dated March 13, 1957	2139	2215
40—Pet-Ritz Frozen Foods, Institutional Size, Price Lists No. 1, No. 2, No. 3, effective March 16, 1957 for various regions; Carnation Company, Price Lists No. 1 & No. 2, effective January 28, 1957 and February 18, 1957	2141	2217
41—Carnation Company—Simple Simon Frozen Foods, Price Lists No. 2 for Zones 1 & 2 effective February 18, 1957 and Price List No. 1 for Zone 1 effective January 28, 1957	2147	2223
42—Sales Contract between Pet Milk Company and Safeway Stores, dated December 24, 1959 with Appendices A & B	2150	2226
Letter from Pet Milk Company (Boyd F. Schenk to Alan W. Young), dated January 6, 1960 with Charts 1 & 2	2162	2238
43—Schedule A—Cost Analysis of Pet-Ritz and Bel-Air Fiscal Year 1961-62	2167	2243
—Schedule B—Justification of Frozen Food Private Label Business	2168	2244

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
44—Pet Milk Company—Frozen Foods Division Price Justification—Bel Air Pies, Year 1961-62	2171	2247
—Pet Milk Company—Frozen Foods Division Costs for Private Label Price Justification 1961-62	2172	2248
46—Rough draft copy of memorandum "To Salesmen or Brokers responsible for contacting Safeway Divisions", with initials JRB	2173	2249
47—Document entitled, "Discussion with Safeway regarding Private Label, July 14, 1959"	2176	2252
48—Memorandum from D. J. Nord to J. A. Dodge, Subject: Management Letter—April 24 through May 29, dated June 4, 1959	2178	2255
49—Memorandum from D. J. Nord to A. M. Coleman dated February 11, 1960, marked "Personal"	2179	2256
50—Memorandum from A. M. Coleman to J. A. Dodge, dated March 4, 1960, "Simple Simon Price Decline—Utah"	2180	2257
51—Interoffice memorandum from D. J. Nord to A. M. Coleman, dated March 7, 1960, "Simple Simon Deal—Utah"	2181	2258
52—Interoffice memorandum from D. R. Davis to Gordon Ellis, dated June 21, 1960, "Current Fruit Pie Pricing and Allowances—Western United States"	2182	2258
53—Interoffice memorandum from D. J. Nord to R. E. Buell, July Management Report, dated August 5, 1960	2183	2260
54—Interoffice Memorandum from D. J. Nord to John Bittner, dated September 6, 1960, "Competition on Frozen Pies"	2184	2262
Carnation Company letter dated July 23, 1960 to "Our Customers" subject "Price Decline on Simple Simon Cream Pies"	2185	2263

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
55—Interoffice memorandum from L. D. Umlauf to Don Davis, dated April 7, 1961, "Utah and Southern Idaho"	2186	2264
56—Memorandum, "Marketing Programs, 8" Fruit Pies—East—Second Sales Assignment, Deal #8", dated January 5, 1961	2187	2265
57—Memorandum from Sales Service Department to Denver, Dallas, St. Louis and Kansas City Division Managers, dated January 24, 1961	2189	2267
—Pet Ritz Promotion Bulletin	2191	2269
58—Carnation inter-office memorandum dated September 19, 1961 re: Pricing—Pet-Ritz and Swiss Miss	2192	2270
59—Inter office memorandum from D. J. Nord to R. E. Buell, November Management Report, dated December 2, 1960	2193	2271
60—Interoffice Pet Memorandum to Mr. John Bittner, from Product Accounting JBE, dated September 23, 1960—"Cost Comparisons 22 and 24 ounce Pies"	2194	2272
61—MRCA Presentation to Pet-Ritz Foods Division of Pet Milk Company on Frozen Dessert Pies, September, 1959	2197	2275
62—Market shares of 8" Frozen Fruit Pie—Intermountain Market—1958, 1959, 1960, 1961	2245	2323
63—Carnation Company's minutes relating to 22 ounce and 20 ounce fruit pies for April 6, 1959, April 30, 1959, September 24, 1959, February 17, 1960 and December 7, 1960	2249	2327
64—Carnation Company—Simple Simon Frozen Foods—Price Lists Nos. 3-17C effective June 17, 1957 thru October 4, 1961 for Zone 1, 1B & 1C	2252	2331

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
65—Carnation Company—Simple Simon Frozen Foods—Price Lists No. 1–17 effective January 28, 1957 thru August 21, 1961 for Zones 2, 2A and 2B	2289	2368
66—Carnation Company—Simple Simon Frozen Foods—Price Lists 2, 2A, effective February 18, 1957 for Zones 1, 1A, 1B, 1C, 2, 2A, 2B, 4, 4A, 5, 5A, 6 & 7	2323	2402
67–74—Marketing programs of Carnation Company for various deals from December 31, 1959 thru August 17, 1961	2430	2509
VOLUME 8		
75—Carnation Company document "Policies—Reporting Production Data to National F. F. Packers Assn.," dated June 10, 1957	2447	2529
76—Pet-Ritz Foods Division, Pet Milk Company, Price Lists from August 15, 1956 thru September 1, 1961	2448	2530
77—Continental Baking Company (Morton) Invoices in the Denver area, 1958	2542	2625
78—Continental Baking Company (Morton) Invoices in the Denver area, 1959	2696	2773
VOLUME 9		
79—Continental Baking Company (Morton) Invoices in the Denver area, 1960	2911	2987
80—Continental Baking Company (Morton) Invoices in the Denver area, 1961	3271	3355
82—Statement of Utah Pie Company, Total Sales By Year and State, 1958-1961	3533	3616

VOLUME 10

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
83—Continental Baking Company (Morton) Invoice dated March 24, 1960 to Denver, Colorado, shipped from Webb City, Iowa	3534	3617
84—Continental Baking Company (Morton) Invoices for Washington for 1958	3535	3618
85—Continental Baking Company (Morton) Invoices for Washington for 1959	3702	3796
86—Continental Baking Company (Morton) Invoices for Washington for 1960	3900	3984

VOLUME 11

87—Continental Baking Company (Morton) Invoices for Washington for 1961	4093	4188
88—Continental Baking Company (Morton) Invoices for Oregon for 1958-1961	4290	4373
89—Continental Baking Company (Morton) Invoices for Denver for 1958-1961	4322	4405
90—Letter from Safeway Stores (Alan W. Young) to Gaylen S. Rigby, Utah Pie Company, dated June 8, 1960	4336	4419
91—Utah Pie Company IBM Listing of Frozen Pie Sales by States, Broken Down by: 1. Brand, 2. Flavor and 3. Date	4337	4420
92—Utah Pie Company Comparative Statements of Income and Expense per Books for years 1957, 1958, 1959, 1960 and 1961	4504	4586

VOLUME 12

93—Statement of Range and Median Prices Paid by Wholesalers for 8-Inch Frozen Fruit Pies of Various Brands—1958-1961 by Months and Flavor	4505	4587

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
94—Utah Pie Company—Estimated Dozens Lost to Defendants, Years 1959, 1960 and Eight Month Period Ended August 31, 1961	4508	4590
95—Utah Pie Company—Summary of Estimated Gross Profits, Revenue and Goodwill Lost by Utah Pie Company Based on Estimated Sales Lost To Defendants and From The Effect of Depressed Prices	4509	4591
96—Utah Pie Company—Detail of Item (A) on Summary—Estimated Gross Profit on Additional Frozen Fruit Pies Utah Pie Company Would Have Sold If 1958 Market Position In Relation to Defendants Had Been Maintained	4510	4592
97—Utah Pie Company—Detail of Item (B) on Summary—Estimated Gross Profit on 23,000 Dozen Frozen Fruit Pies If This Amount Had Been Sold By Utah Pie Company In the Seattle, Spokane and Portland Areas	4516	4598
98—Utah Pie Company—Detail of Item (C) on Summary—Estimated Gross Profit on 231,500 Dozen Frozen Fruit Pies If This Amount Had Been Sold By Utah Pie Company In The Denver and Colorado Areas	4518	4600
99—Utah Pie Company—Detail of Item (D) on Summary—Estimated Gross Profit on 58,088 and 90,000 Dozen Frozen Fruit Pies If These Respective Amounts Had Been Sold By Utah Pie Company to Salt Lake City and Denver Divisions of Safeway Stores	4520	4602
100—Utah Pie Company—Detail of Item (E) on Summary—Additional Revenue Pie Company Would Have Received on Private Label Sales If Prices Had Been Equivalent To Safeway Contract Prices	4522	4604

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
101—Utah Pie Company—Detail of Item (F) on Summary—Additional Revenue Utah Pie Company Would Have Received on Utah Pie Brand Sales If Prices Had Been Based on Amounts as Indicated	4524	4606
102—Pie graph showing "Relative Importance of Various Flavors of Frozen Fruit 8 inch Pies—Intermountain Market 1961	4526	4608
103—Continental Baking Company (Morton) Invoices for Salt Lake City, 1958-1961	4527	4609
104—Transmittal letter from Market Research Corporation to Carnation Company, dated October 31, 1957 with Map outlining the regions within the Simple Simon distribution area	4617	4698
105—Letter from A. C. Nielsen Company to Carnation Company, dated November 25, 1955	4619	4700
106—Letter from Market Research Corporation to Carnation Company, dated July 29, 1958	4620	4701
107—Carnation Company Inter-Office Memorandum from Market Research Department to R. F. Murphy, Re: 1958 Estimated Family Dollar Consumption of Frozen Fruit Pies, dated January 29, 1958	4621	4702
108—Letter from Carnation Company's Market Research Director to A. C. Nielsen Company, dated November 21, 1955	4623	4704
110—Schedule of Mortons—Recap of Sales—Volume—1958-1961	4624	4705

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
111—Schedule of Mortons Net Prices—Apple, Cherry, Boysenberry, Pumpkin and Mince, 1958-1961	4626	4707
112—Pet-Ritz and Swiss Miss Prices 1957, 1958, 1959, 1960 and 1961	4631	4713
—Pet-Ritz Advertising and Sales Promotion Agreements	4684	4766
115—Letter from Mayfair Markets, H. K. Chambossé to Utah Pie Company, January 3, 1963	4753	4835
116—Pet Milk Company Invoices, July to December, 1960 for California, Idaho and Utah	4754	4836
VOLUME 13		
117—Pet Milk Company Invoices, July to December, 1960 for Montana, Salt Lake City and Washington	4865	4947
118—Pet Milk Company Invoices, January-June 1961 for California, Idaho, Utah and Washington	4952	5034
119—Pet Milk Company Invoices, January-June 1960 for California, and Utah	5015	5098
120—Pet-Ritz Foods Division Invoices, July-August, 1958 for California and Utah	5147	5230
121—Pet Milk Company Invoices, January 1960-August 1961 for California, Colorado, Montana and Utah	5167	5250
122—Pet-Ritz Foods Division Invoices, July-December 1959 for California and Utah	5234	5318
126—Carnation Sales Department—Inter-Office Communications to Steve Pappas and W. R. Baar, Seattle, Re: 8" Fruit—Cream Pie Programs, etc., dated April 13, 1961, June 14, 1961 and July 26, 1961	5255A	5340

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Plaintiff's Exhibits—Continued		
127—Carnation Inter-Office Communication, B. D. Eggett to John J. Juneman, dated September 17, 1958	5255E	5344
128—Carnation Sales Department—Inter Office Communication, Subject: 8" Fruit Pie Program, Deal #5-S501W, dated December 9, 1960 and Correction, dated January 11, 1961	5255F	5345
129—Carnation Company Inter-Office Communications, 8" Fruit Pie Program, Salt Lake City Territory, dated September 21, 1960, October 24, 1960, November 23, 1960, December 9, 1960, April 14, 1961 and October 17, 1961	5255H	5348
130—Carnation Sales Department Inter-Office Communication re Deal #41 -S4112W-8" Fruit Pies, November 13, 1959; Pumpkin and Mince Program, September 9, 1960; 8" Fruit Pie Program, Deal #S1905W, May 9, 1961; 8" Fruit Pie Program, Deal #7-S702W, January 9, 1961; Grocery Products No. 1000; and Grocery Products No. 1391—8" Fruit Pie Program Deal #S3109W, dated July 26, 1961	5255Q	5360
VOLUME 14		
Defendant, Continental Baking Company (Morton's) Exhibits		
M-1—Periodical Cost to Doors Manufactured Cost Report—by Quarters for years 1957 thru 1961	5259	5371
M-2—Statement showing Transportation Expenses of Morton Frozen Foods, Webster City, Iowa for 1958 thru 1961	5292	5404

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Continental Baking Company (Morton's) Exhibits—Continued		
M-6—Telegram from Dick Halvarson to William Kitchin with handwritten notations by Mr. Kitchin	5296	5408
M-7—Utah Pie Company Invoice dated October 3, 1960 to Stan Chapman	5297	5409
M-8—Tabulation showing Continental (Morton) Net Pie Pricing—½ Doz. Cases—8" Frozen Pies for the areas of Salt Lake & Boise; Denver; Los Angeles; Southern California; Portland; Seattle; Spokane and Butte; San Francisco; and Northern California for period from September 6, 1957 thru February 28, 1962	5298	5410
M-9—Tabulation of Continental Baking Company for Salt Lake Area of Net Price per Dozen, etc., for period January 6, 1958 thru November 27, 1961	5321	5433
M-10-15—Correspondence between Safeway (Alan W. Young) and Utah Pie (Galen S. Rigby) dated June 1, 1962; June 15, 1962; June 18, 1962; September 13, 1961; September 22, 1960; October 11, 1960; and December 30, 1960	5323	5435
M-16—Utah Pie Co.—Cost Analysis—1960 and 1962	5331	5443
M-20—Charts—Morton Cherry Price Differential Salt Lake vs. Omaha	5333	5445
—Morton Apple Price Differential Salt Lake vs. Omaha	5334	5446
—Morton Cherry Price Differential Salt Lake vs. Los Angeles	5335	5447
—Morton Cherry Price Differential Salt Lake vs. San Francisco	5336	5448

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Continental Baking Company (Morton's) Exhibits—Continued		
M-21—Graph—Comparison of Plaintiff's Sales with Sales By Morton, All Flavors, Utah-Idaho Trading Area, 1958-1962	5338	5449
M-22—Graph—Average Cost of Morton Apple Pies Laid Down in Salt Lake City, 1957-1961	5339	5450
M-23—Graph—Average Cost of Morton Cherry, Peach and Boysenberry Pies Laid Down in Salt Lake City, 1957-1961	5340	5451
M-24—Graph—Average Cost of Morton Pumpkin and Mince Pies Laid Down in Salt Lake City, 1957-1961	5341	5452
M-25—Summary of Profit & Loss, Utah-Idaho Area, 1958-1961	5342	5453
M-26—Tabulation, Morton Frozen Foods Division, Continental Baking Company, Profit & Loss—Sales of Fruit Pies, Utah-Idaho Trading Area, 1958-1961	5343	5454
M-27—Schedule of Profits (Loss) on Sales in Salt Lake City Market After Allocation of Prime Costs, Year, 1961	5349	5460
M-28—Summary of Sales Dozens of Apple, Cherry, Peach & Boysenberry For the Years 1958, 1959, 1960 & 1961, Salt Lake City Market	5350	5461
M-29, 30 & 31—Tabulations, Dozens of Morton Fruit Pies Sold in Idaho, Utah and W. Montana during 1962	5351	5462
M-32 & 33—Correspondence between Ken Kammerman Co. (Rex L. Vance) and Morton Frozen Foods (Dick Halvarson), dated October 13, 1959 and October 15, 1959	5354	5465
M-34—Telegrams from Dick Halvarson to Stan Chapman, dated October 17, 1960 and October 10, 1960	5356	5467

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Continental Baking Company (Morton's) Exhibits—Continued		
M-35—Memo from D. S. Halvarson to Stan Chapman, dated October 28, 1960	5358	5469
M-36—Inter-Office Correspondence from Dick Halvarson to Pete Manos dated May 11, 1960; June 14, 1960; October 10, 1960 and March 14, 1962 with announcements and bulletins put out by wholesale grocers announcing the promotions in various markets and Telegrams from D. S. Halvarson	5359	5470
M-37—Telegrams from Dick Halvarson to William Kitchin, Pete Manos and memos reporting the competitive activity from companies not parties to this action, covering period October 28, 1959 thru October 12, 1961	5395	5507
M-39—Inter-Office Memo from Dick Halvarson to Bill Kitchin, dated September 20, 1961	5404	5516
M-40—Telegrams and Inter-Office memorandums from McCully to Halvarson, Halvarson to Pierson, etc., dated December 12, 1958, December 19, 1958, March 11, 1960, June 17, 1960, October 27, 1960, October 28, 1960 and November 22, 1960	5405	5517
M-48 & 49—Continental Baking Company (Morton) Invoices to Safeway, dated July 21, 1961	5414	5526
M-55—Survey taken by Don Anderson—Salt Lake Tribune—Microfilm Library	5416	5528
M-56—Tabulation of the Advertisements for frozen pies placed by retailers in Deseret News from 1959-1960-1961	5427	5539

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Continental Baking Company (Morton's) Exhibits—Continued		
M-63-68—Letters from Utah Pie Company (Gaylen S. Rigby) to various wholesalers offering and quoting prices on Utah Frozen Pies and on private label pies, dated June 1, 1960, March 2, 1960, December 17, 1960, April 24, 1961, September 13, 1961 and March 12, 1962	5445	5557
M-69—Letter from Utah Pie (M. O. Rigby) to Round Up Grocery Company, dated July 6, 1960	5451	5563
M-70—Letter from Utah Pie Company (M. O. Rigby) to Associated Frozen Foods, dated July 11, 1960	5452	5564
M-71—Letter from Utah Pie Company (Gaylen S. Rigby) to Whitney Frozenfood Company (Alan W. Young) dated April 4, 1960	5453	5565
M-72-86—Correspondence between Utah Pie Company (Gaylen S. Rigby) and Safeway Stores, Inc. (Alan W. Young) dated September 22, 1960, October 11, 1960, December 30, 1960, August 17, 1961, August 23, 1961, August 25, 1961, August 28, 1961, September 5, 1961, September 8, 1961, September 13, 1961, September 18, 1961, September 20, 1961, September 22, 1961, October 26, 1961 and November 2, 1961	5455	5567
M-87—Utah Pie Company Invoices to Safeway Stores, Associated Grocers, Albertson's Food Distribution, Utah Wholesale Frozen Foods, Tosco Distributing Company, Northern Sales, Chase's Ice Cream Co. for period December 16, 1959–March 31, 1962 showing Credit due for Advertising	5475	5587

VOLUME 15

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Continental Baking Company (Morton's) Exhibits—Continued		
M-88—Letter from Utah Pie Company (M. O. Rigby) to Utah Wholesale Grocery, dated December 30, 1959	5519	5631
M-92—Continental Baking Company (Morton's) Invoices and Credit Memoranda, Salt Lake City Market for period January 6, 1958 to April 26, 1962	5520	5632
M-93—Summary only of Utah Pie Company frozen fruit pie invoices for the year 1962	5609	5721
Defendant, Carnation Company's Exhibits		
C-B thru C-F—Carnation Company's Simple Simon Frozen Foods pricing programs and advertising allowances in effect in the territories of Spokane, Denver, Southern California (including Fresno), Northern California (excluding Fresno) and Salt Lake City for the period of January 1, 1957–August 31, 1961	5610	5722
C-G—Chart—Carnation Apple Price Differential Salt Lake vs. Phoenix	5655	5767
C-H—Chart—Carnation Apple Price Differential Salt Lake vs. No. California	5656	5768
C-I—Chart—Carnation Apple Price Differential Salt Lake vs. So. California	5657	5769
C-J—Chart—Carnation Apple Price Differential Salt Lake vs. Seattle	5658	5770
C-K—Chart—Carnation Apple Price Differential Salt Lake vs. Spokane	5659	5771
C-L—Chart—Carnation Apple Price Differential Salt Lake vs. Denver	5660	5772
C-M—Chart—Carnation Apple Price Differential Salt Lake vs. Dallas	5661	5773

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Carnation Company's Exhibits—Continued		
C-N—Chart—Carnation Apple Price Differential Salt Lake vs. St. Paul	5662	5774
C-O—Simple Simon Frozen Fruit Pies, Annual Case Sales for Territory of Salt Lake City, 1957–1962	5663	5775
C-P—Comparison of Volume in Cases—Carnation Co.–Utah Pie Co., Utah Area Only, 1958–1961	5665	5777
C-Q—IBM tabulation showing data from all of the Carnation Company invoices for the Salt Lake City Office for 1958–1961	5666	5779
C-R—Comparison of Carnation Company–Utah Pie Company Sales To Three Largest Buyers—Salt Lake City Area 1958 through 1961, Inclusive—6 Flavor Totals	5708	5821
C-S—Carnation Company Average Selling Price Bracket—Salt Lake Territory Per IBM Report 1958–1961	5709	5822
C-U—Carnation Company—Salt Lake City Area—Gross Profit Summary—Amounts Represent Per Dozen—250 Case Selling Price	5710	5823
Defendant, Pet Milk Company's Exhibits		
A-27—Tabulation by Quarters showing "Number of Advertisements for Frozen Pies Placed by Retailers in Salt Lake City Newspapers, January 1957-December 1961	5711	5824
A-32—Tabulation of Pet Milk Company—Advertising Expenditures—Frozen Fruit Pies 1957 Through Fiscal 1962	5712	5825
A-33—Chart—Advertising and Promotion Expenditures—Frozen Fruit Pies—Pet Milk Company—1957 Through Fiscal 1961	5713	5826

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Pet Milk Company's Exhibits—Continued		
A-35—Market Share and Price Trend Study on "8" Frozen Fruit Pies In The "Intermountain Market" by Dr. R. H. Anderson and Dr. E. W. Lamborn of Utah State University	5714	5827
A-38—Chart—Prices Paid Per Case by Wholesalers for 8-Inch Frozen Apple Pie—1958–1961 Pet-Ritz, Simple Simon, Utah, Bel-Air, Swiss Miss, Frost 'N' Flame, and Mortons	5732	5843
A-45—Listing of Lowest Invoice Prices in Salt Lake City on Apple Pie by Pet-Ritz, Utah Pie and Swiss Miss for May 1958–August 1961	5733	5846
A-46—Financial Statements of Utah Pie Company		
—Comparative Balance Sheets and Rates of Return for October 1957 thru October 1961	5734	5847
—Comparative Statements of Income and Expense per Books for October 1957 thru October 1961	5737	5850
—Adjustments to Net Income Per Books for October 1957 thru October 1961	5738	5851
—Schedule of Other Expenses for October 1957 thru October 1961	5739	5852
—Analysis of Surplus October 31, 1956 to October 31, 1961	5740	5853
—Comparative Statements of Income and Expense as Adjusted October 31, 1957 thru October 31, 1961	5741	5854
—Payroll of Officers, Etc.—1961–1956	5742	5855

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Defendant, Pet Milk Company's Exhibits—Continued		
A-47—Chart—Utah Pie Company: Net Income or Loss 1957–1961	5745	5859
—Chart—Utah Pie Company: Net Income or Loss to Business and Total Rigby Family Salaries and Fees, 1957–1961	5746	5860
A-48—Chart—Total Income Frozen Pie Sales, and Income Less Frozen Pies, 1957–1961	5747	5861
Index to Brief of Appellee in Case No. 7308 filed in United States Court of Appeals for the Tenth Circuit	5748	5862

[fol. A]

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 7306.

CONTINENTAL BAKING COMPANY, a Delaware corporation, Appellant,

vs.

UTAH PIE COMPANY, a Utah corporation, Appellee.

No. 7308

CARNATION COMPANY, a Delaware corporation, Appellant,

vs.

UTAH PIE COMPANY, a Utah corporation, Appellee.

No. 7309

PET MILK COMPANY, a Delaware corporation, Appellant,

vs.

UTAH PIE COMPANY, a Utah corporation, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

[fol. 1]

APPELLANT, CONTINENTAL BAKING COMPANY'S STATEMENT OF POINTS RELIED UPON, CASE NO. 7306—Filed April 16, 1963

1. The court below erred in that there was no evidence sufficient to permit the jury to find that Continental's territorial price difference complained of had a reasonable probability of substantially lessening competition or tending to create a monopoly in the relevant product and geographic markets.

2. The court below erred in that there was no evidence sufficient to permit the jury to find, even if it could find that any Continental price was part of an unlawful discrimination, that any such price charged by Continental was the proximate cause of any injury to appellee's business or property.

3. The court below erred in that there was no evidence sufficient to permit the jury to find, even if it could find that any Continental price was part of an unlawful discrimination, that any such discrimination was the proximate cause of any injury to appellee's business or property.

6. The court below erred in refusing to instruct the jury on the meaning in law of the limitation in Section 2(a) of the amended Clayton Act that price differences are prima

[fol. 2] 4. The court below erred in permitting the jury to find that the alleged unlawful discrimination in Continental's price had caused damage to appellee in any reasonably ascertainable amount.

5. The court below erred in refusing adequately to instruct the jury that plaintiff must show by a preponderance of the evidence a reasonable likelihood of a substantial lessening of competition or tendency to create a monopoly in the relevant market in order to establish a prima facie violation of Section 2(a) of the Clayton Act.

facie unlawful only where their effect may be "substantially to lessen competition or tend to create a monopoly."

7. The court below erred in failing to instruct the jury clearly and unequivocally that Continental's lower price was not actionable if made in good faith to meet the equally low price of a competitor.

8. The court below erred in failing to instruct the jury on the meaning in law of the defense alleged by Continental that its price "was made in good faith to meet an equally low price of a competitor."

9. The court below erred in failing to instruct the jury in response to the jury's special inquiry that a $3.00 price in Salt Lake City, compared with a $4.00 price in Los Angeles, is not unlawful where the $3.00 price does not undercut the competitor's price and where the $3.00 price is charged in good faith.

10. The court below erred in refusing to reply affirmatively and responsively to the special question of the jury and in reemphasizing instead to the jury by repeated instructions highly prejudicial matters not relevant to the jury's inquiry.

11. The court below erred in instructing the jury that good faith meeting of an equally low price of a competitor is not a defense to a charge of territorial price discrimination.

[fol. 3] 12. The court below erred in refusing to charge the jury in response to the jury's special inquiry substantially in conformity with the charge prepared for the court's consideration and proposed jointly by defendants Continental and Carnation Company.

13. The court below erred in permitting the jury to assess damages against Continental in an amount grossly in excess of what plaintiff's maximum net profit could have been on the sales made by Continental at allegedly unlawful lower discriminatory prices.

14. The court below erred in permitting the jury to find that appellee had been injured by mere price quotations of Continental, unaccompanied by actual sales at the alleged unlawful lower discriminatory prices.

15. The court below erred in permitting the jury to consider against Continental all lower prices charged by plaintiff over a four year period without instructing the jury that plaintiff was required to prove by a preponderance of the evidence that such lower prices were the proximate result of sales made by Continental at alleged unlawful lower discriminatory prices.

16. The court below erred in failing to instruct the jury on the meaning of Continental's defense that any lower prices charged of which plaintiff complained were the result of "price changes from time to time where in response to changing conditions affecting the market for . . . the goods concerned."

17. The court below erred in admitting, and permitting the jury to consider against Continental, the following evidence:

a. Testimony of plaintiff's witness Gaylen Rigby, and other testimony offered on plaintiff's behalf, purporting to show plaintiff's alleged injury as a claimed result of Continental's alleged violations.

b. Testimony by witnesses Chapman and Gaylen Rigby regarding certain transactions and conversations between them relating to events occurring prior to the time witness Chapman began negotiating as an independent frozen food broker to represent Continental's frozen food line in the Salt Lake City marketing area.

c. Cost and profit data relating to Continental's frozen fruit pies and other products.

[fol. 4] d. Exhibits 94-101 purporting to establish and measure plaintiff's alleged damages caused by Continental.

e. Testimony, exhibits, and statements of plaintiff's counsel relating to Continental's overall size, volume of sales, and total amount of profits.

18. The court below erred in refusing to admit the following evidence:

a. Continental's Exhibit 6 for identification and testimony relating thereto tending to establish no intent on the part of Continental to injure plaintiff company, or to injure competition generally.

b. Testimony by witnesses Henzke, Degenhardt, Smith, Halvarson and Kitchin, relating to competitive marketing conditions in various marketing areas and tending to establish no probability of a substantial lessening of competition or tendency to monopoly in the relevant markets.

c. Exhibits 32, 34 and 40 for identification recording Continental's efforts to compete in the Salt Lake City marketing area.

19. The court below erred in permitting plaintiff's counsel to make repeated and prejudicial remarks in the presence of the jury concerning an alleged "missing witness"; and to make repeated, unfounded and prejudicial charges that Continental's counsel had failed to comply with the court's pretrial discovery orders. The court also erred in refusing to instruct the jury to disregard these repeated remarks.

20. The court below erred in repeatedly interrupting the cross-examination of witness Gaylen Rigby and in refusing to permit relevant and proper questions propounded to that witness, thus prejudicing appellant's right to full and fair cross-examination.

21. The court below evidenced partiality in the presence of the jury in favor of the plaintiff and its counsel and against defendant Continental and its counsel.

[fol. 5] 22. The court below erred in awarding against Continental attorney's fees which are excessive on the showing made by plaintiff's counsel.

In Respect of Continental's Appeal from Entry of Judgment n.o.v. on Its Counterclaim

1. The court below erred in granting plaintiff a judgment n.o.v. on Continental's counterclaim where plaintiff had failed to move for a directed verdict or dismissal at any time before the case was submitted to the jury.

2. The court below erred in holding that there was no evidence in the record sufficient to permit the jury to find, as it did find, that plaintiff's consistent price discriminations among competing customers had proximately caused damage to Continental's business or property.

In Respect of the Injunctive Decree

1. Even if the lower court's judgment of violation of Section 2(a) of the amended Clayton Act is valid as a matter of law, the injunctive decree issued by the court was invalid and also an abuse of that court's discretion.

John H. Schafer, Atty. for Appellant, Continental Baking Co.

In United States Court of Appeals

Statement and Certificate Required by Rule 14(10), Case No. 7306—Filed April 16, 1963

Now comes appellant Continental Baking Company, by its attorney, and states that in support of the following material and controverted facts no admissible evidence was introduced:

1. That appellant's territorial price difference complained of had a reasonable probability of substantially

lessening competition or tending to create a monopoly in any relevant market.

[fol. 6] 2. That appellee was injured in its business or property by any price charged by appellant as part of an unlawful discrimination.

3. That appellee was injured in its business or property by any unlawful discrimination in price charged by appellant.

4. That appellee was injured in its business or property by any unlawful discrimination in price in any reasonable ascertainable amount.

John H. Schafer, Attorney for Appellant, Continental Baking Company.

Of counsel: A. Pratt Kesler, Welborn & Dufford, Covington & Burling.

Certificate

This is to certify that the above statement required by Local Rule of Court 14(10) is made in good faith.

John H. Schafer, Attorney for Appellant, Continental Baking Company.

In United States Court of Appeals

Appellant, Carnation Company's Statement of Points Relied Upon, Case No. 7308—Filed April 16, 1963

Pursuant to Rule 16 of the rules of this court, Appellant Carnation Company hereby states it intends to rely on the following points on the appeal:

1. The trial court erred (a) in not granting defendant Carnation Company's motion for a directed verdict at the

end of plaintiff's case and at the end of all the evidence, and (b) in not granting defendant Carnation Company's motion for judgment notwithstanding the verdict, on the grounds stated in said motions, and particularly:

a. In that there was no evidence sufficient to permit the jury to find that Carnation's territorial price difference complained of had a reasonable probability of substantially lessening competition or tending to create a monopoly in the relevant product and geographic markets.

[fol. 7] b. In that there was no evidence sufficient to permit the jury to find that any territorial price difference of Carnation was the proximate cause of any injury to appellee Utah Pie Company's business or property.

c. In that there was no competent evidence sufficient to permit the jury to find that the alleged unlawful discrimination in Carnation's prices had caused damage to appellee in any reasonably ascertainable amount.

2. The trial court erred in not granting defendant Carnation Company's alternative motion for a new trial on the grounds stated in said motion and particularly:

a. In refusing adequately to instruct the jury that plaintiff must show by a preponderance of the evidence a reasonable likelihood of a substantial lessening of competition or tendency to create a monopoly in the relevant market in order to establish a prima facie violation of Section 2a of the Clayton Act.

b. In refusing to instruct the jury on the meaning in law of the limitation in Section 2a of the Clayton Act, that price differences are prima facie unlawful only where their effect may be "substantially to lessen competition or tend to create a monopoly."

c. In failing to instruct the jury clearly and unequivocally that Carnation's lower price was not actionable if made in good faith to meet the equally low price of a competitor.

d. In failing to instruct the jury on the meaning in law of the defense alleged by Carnation that its prices were "made in good faith to meet an equally low price of a competitor."

e. In failing to instruct the jury in response to the jury's special inquiry that a $3.00 price in Salt Lake City, compared with a $4.00 in Los Angeles, is not unlawful where the $3.00 price does not undercut the competitor's price and where the $3.00 price is charged in good faith.

f. In refusing to reply affirmatively and responsively to the special question of the jury and in re-emphasizing instead to the jury, by repeating prior instructions, highly prejudicial matters not relevant to the jury's inquiry.

[fol. 8] g. In instructing the jury that good faith meeting an equally low price of competitor is not a defense to a charge of territorial price discrimination.

h. In refusing to charge the jury in response to the jury's special inquiry substantially in conformity with the charge prepared for the court's consideration and proposed jointly by defendants Continental and Carnation.

i. In permitting the jury to assess damages against Carnation in an amount grossly in excess of what plaintiff's maximum net profit could have been on the sales made by Carnation at allegedly unlawful or discriminatory prices.

j. In permitting the jury to consider against Carnation all lower prices charged by plaintiff over a 4 year period without instructing the jury that plaintiff was required to prove by a preponderance of the evidence that such lower prices were the proximate result of sales made by Carnation at alleged unlawful lower discriminatory prices.

k. In failing to instruct the jury on the meaning of Carnation's defense that the lower prices charged of which plaintiff complained were the result of price changes from time to time in response to changing conditions affecting the market for the goods concerned.

l. In admitting and permitting the jury to consider against Carnation:

(1) Testimony of plaintiff's witness Gaylen Rigby and others purporting to show plaintiff's alleged injury as a claimed result of Carnation's alleged violations.

(2) Cost and profit data relating to Carnation's frozen fruit pies and other products.

(3) Exhibits 94 to 101 purporting to establish and measure plaintiff's alleged damages caused by Carnation.

(4) Testimony, exhibits and statements of plaintiff's counsel relating to Carnation's overall size, volume of sales and total amount of profits.

[fol. 9] (5) Testimony as to pricing and selling activities of the other defendants.

m. In refusing to admit Carnation's exhibits CY, CZ, CA-1, CA-2, CA-3 and CA-4, and the other minutes of the Carnation frozen food committee, tending to establish no intent on the part of Carnation Company to injure plaintiff company or to injure competition generally and offered to show that Carnation's prices were established in each locality in good faith to meet an equally low price of a competitor and offered to explain other minutes of said committee introduced by plaintiff.

n. In repeatedly interrupting the cross-examination of witness Gaylen Rigby and in refusing to permit relevant proper questions propounded to that witness, thus prejudicing appellant's right to a full and fair cross-examination.

o. In evidencing partiality in the presence of the jury in favor of the plaintiff and its counsel and against defendant Carnation and particularly its counsel.

p. In allowing counsel for plaintiff in his summation to make, over objection of defendants, untrue disparaging remarks with respect to the charts introduced in evidence

by defendants showing the relative prices of plaintiff and defendants.

3. The trial court erred in not granting defendant Carnation Company's motion for a separate trial as to the claim of individual violation of the Clayton Act as amended by the Robinson-Patman Act.

4. The trial court erred in granting and in issuing the injunction against Carnation Company and denying defendant Carnation Company's motion to alter or amend the decree or to suspend the decree pending appeal.

Dated this 15th day of April, 1963.

Peter W. Billings, Attorney for Appellant, Carnation Company.

[fol. 10]

IN UNITED STATES COURT OF APPEALS

STATEMENT AND CERTIFICATE AS REQUIRED BY RULE 14(10), CASE No. 7308—Filed April 16, 1963

Comes Now appellant Carnation Company pursuant to Rule 14(10) of the rules of this court and respectfully submits:

(1) That it has, pursuant to Rule 75a of the Federal Rules of Civil Procedure designated the entire record on appeal.

(2) That the following material and controverted facts (a) that any territorial price difference of the defendant Carnation Company had a reasonable probability of substantially lessening competition or tending to create a monopoly in the relevant product and market area, and (b) that any territorial price difference of defendant Carnation was the proximate cause of any injury to appellee's

business or property, were not established by substantial evidence.

Respectfully submitted,

Peter W. Billings, Attorney for Appellant, Carnation Company.

Certificate of Counsel

Peter W. Billings, counsel of record for appellant Carnation Company does hereby certify, pursuant to Rule 14(10) of this court, that the foregoing statement is made in good faith.

Peter W. Billings, Attorney for Appellant, Carnation Company.

IN UNITED STATES COURT OF APPEALS

APPELLANT PET MILK COMPANY'S STATEMENT OF POINTS RELIED UPON, CASE No. 7309—Filed April 16, 1963

1. The court below erred in that there was not sufficient evidence to permit the jury to find that the appellant Pet Milk Company had, except on rare occasions, charged lower prices for its frozen fruit pies in Utah than it had charged for pies of like grade and quality in other states in the Western United States.

[fol. 11] 2. The court below erred in that there was not sufficient evidence to permit the jury to find that, if the Pet Milk Company charged different prices for its frozen fruit pies of like grade and quality, the differentials did not make only due allowance for differences in the cost of manufacture, sale, or delivery of the products to different purchasers.

3. The court below erred in that there was not sufficient evidence to permit the jury to find that, if the Pet Milk Company charged different prices for its frozen fruit pies in different geographical markets, the differentials were not in response to changing conditions affecting the market for the goods concerned.

4. The court below erred in that there was not sufficient evidence to permit the jury to find that, if the Pet Milk Company charged different prices for its frozen fruit pies in different geographical markets, the differentials were not made in good faith to meet the equally low price of a competitor or competitors.

5. The court below erred in that there was not sufficient evidence to permit the jury to find that, even if the Pet Milk Company had charged different prices for its frozen fruit pies in different geographic areas, there had been any substantial lessening of competition or tendency toward monopoly in the market in which the appellee sold its frozen fruit pies in competition with the Pet Milk Company.

6. The court below erred in that there was not sufficient evidence to permit the jury to find that the appellee had suffered injury to its business or property.

7. The court below erred in that there was not sufficient evidence to permit the jury to find that, even if the Pet Milk Company had violated Section 2(a) of the Clayton Act, as amended, and if appellee had suffered injury to its business or property, Pet's violation was the proximate cause of appellee's injury.

8. In view of the evidence showing that appellant Pet had consistently studied the market for its frozen fruit pies, so that its products would be responsive to consumer demands; and had consistently studied its own operations in relation to the product, to bring those operations into a profitable position, the court below erred in permitting the jury to conclude that the Pet Milk Company had violated Section 2(a) of the Clayton Act as amended.

[fol. 12] 9. The court below erred in admitting, as against the Pet Milk Company, and in permitting the jury to consider the following evidence:

a. Plaintiff's Exhibits 24 and 25, purporting to compare net sales prices for frozen fruit pies in the Salt Lake Division with all other divisions.

b. Plaintiff's Exhibit 27, a tabulation purporting to show losses by the Pet Milk Company on the sale of frozen pies in the Salt Lake Area.

c. Plaintiff's Exhibit 31, a summary of annual sales and net income before taxes of the Pet Milk Company.

d. Plaintiff's Exhibits 94-101, purporting to establish appellee's alleged loss of gross profit and goodwill.

e. All cost and profit data relating to the sale of frozen fruit pies and other products by the Pet Milk Company in various parts of the United States.

f. Plaintiff's Exhibit 38, and all testimony relating to a visit by Boyd Schenk, an employee of the Pet Milk Company, to the plant of the appellee.

g. Plaintiff's Exhibit 47, and all testimony related thereto.

h. Testimony elicited by Appellee's counsel from an expert witness called by appellant, Dr. Roice Anderson, in response to questions based on hypothetical statements of facts, contrary to the evidence, which questions called for legal conclusions.

10. The court below erred in refusing to admit on behalf of the Pet Milk Company the following evidence:

a. Pet Exhibits M through Z, A-1 through A-16, and A-20 through A-24, so-called management and competitive activity reports kept by the Pet Milk Company in the ordinary course of its business.

b. Testimony of the expert witness called by the Pet Milk Company regarding the statistical validity of the selection of a base year for use in connection with Plaintiff's Exhibits 95 and 96.

[fol. 13] 11. The court below erred in instructing the jury on the following points:

a. That the Clayton Act of 1914 was to curb the use of localized price cutting tactics which had an adverse effect upon the competitive position of other sellers.

b. That the size of each defendant and its economic power or lack of it could be considered in determining whether any geographic price discrimination was for predatory ends.

c. That the good-faith-meeting-of-competition defense was not available to a defendant, if the defendant had been shown to have planned to sell frozen pies in Utah at a loss before it knew what prices its competitors were to charge for similar pies.

d. That Plaintiff's Exhibits 94-101 could be considered in assessing the appellee's possible injury.

12. The court below erred in failing to instruct the jury that the appellee was not entitled annually to a fixed 70 per cent of the total sales of frozen fruit pies, other than private label pies, in the Intermountain Area.

13. The court below erred in giving an unresponsive, confusing, and prejudicial instruction in response to the jury's special inquiry on the legality of charging $3 for frozen fruit pies in Salt Lake City and $4 for the pies in Los Angeles, if the $3 price in Salt Lake City did not go below a competitor's price there; and in refusing to give appellant Pet Milk Company's Requested Additional Instruction, a revised copy of which was filed with the Clerk of the District Court on February 26, 1963.

14. The court below erred in permitting counsel for the appellee an inflammatory, repetitious closing statement to the jury, most of which was contrary to the evidence.

15. The Court below erred in issuing an injunction permanently enjoining appellant from selling its frozen fruit pies in the States of Utah, Idaho, Washington, Montana, and Colorado, at prices lower than are charged in California, without the requirement that any price differen-

tials tend substantially to lessen competition or to create [fol. 14] a monopoly in a line of commerce, and without the benefit of the defenses provided by Sections 2(a) and (b) of the Clayton Act as amended.

Respectfully submitted,

George P. Lamb, Attorney for Appellant, Pet Milk Company.

Of Counsel: Carrington Shields, Lee, Toomey & Kent; Gene Mayfield; Paul Thatcher.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Pleas and proceedings before the Honorable Willis W. Ritter, Chief Judge of the United States District Court for the District of Utah, Presiding in the following entitled cause:

UTAH PIE COMPANY, a Utah Corporation, Plaintiff,

vs.

CARNATION COMPANY, a Delaware Corporation, PET MILK COMPANY, a Delaware Corporation, and CONTINENTAL BAKING COMPANY, a Delaware Corporation, Defendants.

No. C-148-61, Civil.

COMPLAINT

(For Damages And Injunctive Relief Under The Sherman And Clayton Antitrust Laws Of The United States)

(Jury Demanded)

The above named plaintiff complains of the above named defendants and alleges as follows:

1. This complaint is filed and these proceedings are instituted against the defendants under Sections 15 and 26 of Title 15 U.S.C.A.

2. The plaintiff is a corporation duly organized and existing under the laws of the State of Utah with its principal place of business in Salt Lake City, Utah. It is engaged primarily in the manufacture of frozen pies in the State of Utah. It markets its products through distributors in Utah, Idaho, Washington, Oregon and Wyoming. It competes in the State of Utah with the defendants. It and its predecessors in interest have been engaged in the pie business for about thirty years.

[fol. 16] 3. The defendant Carnation Company is a Delaware corporation organized and existing under the laws of the State of Delaware and has its principal place of business for the sale and distribution of frozen pies in Los Angeles, California and markets its frozen pies under the name and label of "Simple Simon."

4. The defendant Pet Milk Company is a corporation organized and existing under the laws of the State of Delaware with its principal place of business for the sale and distribution of its frozen pies in Fresno, California and markets its frozen pies under the name and label of "Pet Ritz" and "Swiss Miss".

5. The defendant Continental Baking Company is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York City, New York but causes its frozen pies to be manufactured and distributed out of Watsonville, California under the name and label of "Morton Pies".

6. The defendants transact business in the State of Utah by the sale of frozen pies in interstate commerce to dis-

tributors for resale. They manufacture their frozen pies under the aforesaid names and labels at the places of business as set forth above and market their frozen pies throughout the western United States. None of the pies sold by defendants are manufactured in Utah but are shipped into Utah by trucks or by common carrier for resale in the State of Utah at prices agreed upon between defendants and their respective distributors and among the defendants themselves. The price discriminations hereinafter alleged involve a lower price on the frozen pies that are shipped from the various points in California to Salt Lake City, Utah by said defendants than that charged in areas where plaintiff does not distribute. The discriminatory price is made by agreement among the three defendants and by each defendant and its Utah distributors separately in advance of the interstate shipment.

7. Beginning at a period of time unknown to plaintiff but believed to be in or about June of 1959, the defendants have combined and conspired to restrain interstate commerce by impairing and destroying the competition of plaintiff, which is the only small, independent frozen pie manufacturer and distributor in the State of Utah. It was the intent and purpose of this combination and conspiracy to weaken the capital structure of the plaintiff and to destroy its profits to the end that its competition would be eliminated. [fol. 17] This combination and conspiracy and the means and methods used to effectuate it, as hereinafter stated, were contrary to Sections 1 and 2 of the Sherman Act (15 U.S.C.A. 1 and 2) and Section 2(a) of the Clayton Act (15 U.S.C.A. 13(a)). By reason of the aforesaid violations, defendants have substantially lessened, limited and restrained competition in the State of Utah.

8. The plan of defendants to destroy the competition of plaintiff was pursued by defendants from its inception to the present time by means of the following things and acts which defendants have done:

a. Defendants have made price discriminations in the distribution of their frozen pies, maintaining a high and profitable price in their operations outside the State of Utah and cutting their prices on sales in the State of Utah below their cost of production and cost of distribution;

b. Defendants have subsidized their sales below cost in the State of Utah from their profitable interstate operations in other western states;

c. Defendants have kept their prices high in western states other than the State of Utah by means of agreements among themselves covering said states;

d. Defendants have kept their prices low and below cost in the State of Utah by means of price maintenance agreements between themselves and their respective distributors to be effective within the State of Utah;

e. Defendants have sold their products at unreasonably low prices in the State of Utah for the purpose of destroying the competition of the plaintiff;

f. Defendants have sold their products at unreasonably low prices in the State of Utah for the purpose of eliminating plaintiff as a competitor while subsidizing their losses from sales at a higher price in other western states of the United States;

g. Defendants have maintained their low prices in the State of Utah, sometimes below the costs of production, during a period of rising costs between June of 1959 and August of 1961 and raised their prices in neighboring states to Utah to compensate for their increased costs, thus compelling plaintiff to absorb all increased costs without a compensating increase in price.

[fol. 18] 9. The acts mentioned in the paragraph next preceding were intended by each and every defendant to destroy the competition of plaintiff.

10. Unless the defendants are restrained by this Court from their two-price policy as hereinabove alleged, their price fixing and price discriminations, their subsidizing the below cost sales in Utah by higher prices in states where plaintiff does not distribute, the plaintiff will be forced out of business or will be compelled to salvage what it can by forced sale of its business.

11. By reason of the aforesaid combination and conspiracy in restraint of trade, the business of plaintiff has been seriously impaired and damaged and the plaintiff has suffered loss of profits and loss to its good will. Plaintiff's damage within the four years immediately preceding the filing of this complaint as a result of defendants' violations of the antitrust laws was approximately $250,000.00.

Wherefore, the plaintiff prays as follows:

1. That plaintiff receive with interest as damages for the injury to its business the sum of $250,000.00 trebled, and the Court award a reasonable attorneys' fee in accordance with Section 4 of the Clayton Act;

2. That defendants be enjoined and restrained from each of the unlawful practices herein alleged;

3. That the aforesaid plan, combination and conspiracy in restraint of interstate trade and commerce be adjudged and decreed to be unlawful, and be enjoined;

4. That the Court issue a preliminary injunction restraining the defendants from their practice of discriminatory pricing;

5. That plaintiff recover its costs herein; and,

6. That the plaintiff have such other and further relief as this Court may deem proper.

King and Hughes, By Robert W. Hughes.

Of Counsel: Joseph L. Alioto.

[fol. 19]

IN UNITED STATES DISTRICT COURT

CARNATION COMPANY'S INTERROGATORY No. 20 TO PLAINTIFF—Filed October 2, 1961

To: The plaintiff Utah Pie Company, a Utah corporation, and to King and Hughes, its attorneys.

Carnation Company, one of the defendants above named, requests that the plaintiff, Utah Pie Company, a Utah corporation, by an officer or agent thereof, answer under oath, pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

* * * * * * * *

20. Set forth the name and address of each customer which your Company has lost or whose purchases from your Company have diminished by virtue of any of the alleged agreements, combinations or conspiracies or price discriminations referred to in the complaint.

* * * * * * * *

Peter W. Billings, Fabian & Clendenin, Attorneys for Defendant, Carnation Company.

IN UNITED STATES DISTRICT COURT

ANSWER TO INTERROGATORY No. 20 OF DEFENDANT, CARNATION COMPANY—Filed February 21, 1962

Comes Now Gaylen S. Rigby, director of plaintiff, Utah Pie Company, and first being duly sworn upon his oath deposes and answers the Interrogatories to plaintiff as follows:

* * * * * * * *

20. Safeway, Salt Lake City, Utah.
American Food Stores, Ogden, Utah.
Associated Food Stores, Pocatello, Idaho.

* * * * * * * *

Gaylen S. Rigby.

Subscribed and Sworn to before me this 31 day of January, 1962.

Robert W. Hughes, Notary Public, My Commission Expires: June 21, 1965.

(Seal)

[fol. 20]

IN UNITED STATES DISTRICT COURT

ANSWER OF PET MILK COMPANY TO COMPLAINT—
Filed November 17, 1961

Defendant Pet Milk Company for its answer to the complaint herein states its defenses as follows:

First Defense

1. The complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Admits that plaintiff purports to invoke the jurisdiction of this Court under the statutes specified in paragraph 1 of the complaint (15 U.S.C. sections 15, 26) for alleged violations of the statutes specified in paragraph 7 (15 U.S.C. Sections 1, 2, 13(a)) of the complaint, but denies that it has violated or intends to violate the statutes or that it is liable to plaintiff by reason of the statutes or for any other reason.

3. Admits the corporate existence of the plaintiff, that plaintiff is engaged in the manufacture and distribution of frozen pies and that plaintiff competes with defendant in the State of Utah; but states that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 2 of the complaint.

4. Admits that Carnation Company and Continental Baking Company are Delaware corporations, but states that it is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of paragraphs 3 and 5 of the complaint.

5. In response to paragraph 4 of the complaint, admits that Pet Milk Company is a corporation organized and existing under the laws of the State of Delaware; denies that its principal place of business for the sale and distribution of its frozen pies is in Fresno, California; states that it maintains a plant for the manufacture and shipment of frozen pies in Fresno, California, but that its principal place of business for the sale and distribution of its frozen pies is in St. Louis, Missouri; and admits that it markets its frozen pies under trade names and trademarks Pet-Ritz and Swiss Miss.

[fol. 21] 6. In response to paragraph 6 of the complaint, admits that it transacts business in the State of Utah by the sale of frozen pies in interstate commerce to distributors for resale there; admits that it manufactures and sells its frozen pies under the names of Pet-Ritz and Swiss Miss in the western United States; admits that none of the frozen pies sold in Utah are manufactured there and that its frozen pies are shipped by truck or common carrier to Utah from outside the state; denies that its frozen pies are sold at any prices agreed upon with the other defendants; denies that it sells frozen pies at prices lower in Utah than in areas where plaintiff does not distribute, except as it may have sold at lower prices in good faith to meet the equally low price of a competitor or competitors; and denies that any prices for the resale of its frozen pies are set through agreement with its Utah distributors, in advance of interstate shipment or any other time; and states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 insofar as they relate to the other defendants.

7. Defendant denies each and every allegation of paragraphs 7, 8, 9, 10, and 11 of the complaint, except that it states that it is without knowledge or information sufficient to form a belief as to the size and independence of plaintiff, as alleged in paragraph 7.

Third Defense

8. Alleges that if at any time prices for frozen pies have been lower than those charged by defendant for frozen pies of like grade and quality in other Western states or elsewhere, the reductions in Utah have been necessitated by and made in good faith to meet the equally low price of a competitor or competitors.

Wherefore, having fully answered the complaint herein, defendant Pet Milk Company respectfully demands judgment discharging it from all liability in the premises, for its costs and disbursements of the action, and for such further relief as to the Court may seem just and proper in the premises.

Paul Thatcher of Young, Thatcher & Glasmann, Attorneys for defendant, Pet Milk Company.

Of Counsel for Pet Milk Company, Gene Mayfield; George P. Lamb.

[fol. 22]

In United States District Court

Answer of Carnation Company—
Filed November 15, 1961

Comes now defendant Carnation Company and answers the complaint filed herein as follows:

First Defense

The complaint fails to state a claim against this answering defendant upon which relief can be granted.

Second Defense

1. Answering paragraph 1 of the complaint, this answering defendant admits plaintiff is attempting to proceed under the statutes specified, but denies that it has violated or intends to violate the statutes specified in the complaint or that it is liable to plaintiff by reason of said statutes or for any other reason.

2. Answering paragraph 2, this answering defendant admits that plaintiff is a corporation, that plaintiff is engaged in the business of manufacturing and distributing frozen pies and that plaintiff competes with this defendant in said business in the state of Utah; but alleges that this defendant does not have sufficient knowledge or information upon which to form a belief as to the truth of the other allegations of paragraph 2.

3. Admits the allegations of paragraph 3.

4. Answering paragraphs 4 and 5, this defendant alleges that it does not have sufficient knowledge or information upon which to form a belief as to the truth of the allegations thereof.

5. Answering paragraph 6, this defendant admits that it transacts business in the state of Utah by the sale of frozen pies in interstate commerce to distributors for resale; admits that it manufactures its frozen pies in Torrance, California under the name and label of Simple Simon; admits that it markets its frozen pies in parts of the western United States; and admits that none of the pies sold by this defendant are manufactured in Utah, and that the pies sold by it in Utah are shipped into Utah by trucks or common carriers for resale. This defendant denies each and every other allegation of paragraph 6.

[fol. 23] 6. This defendant denies the allegations of paragraphs 7, 8, 9, 10 and 11 of the complaint.

Third Defense

Alleges that if at any time the prices charged by this defendant for frozen pies in the state of Utah have been

lower than those charged by this defendant for frozen pies of like grade, size and quality elsewhere, such lower prices were charged in good faith to meet the equally low price of a competitor or competitors.

Wherefore, having fully answered the complaint herein, defendant Carnation Company respectfully demands judgment dismissing the complaint together with its costs and disbursements herein and for such further and additional relief as the court may deem just and proper in the premises.

Peter W. Billings, Fabian & Clendenin, Attorneys for Defendant, Carnation Company.

James R. Baird, Jr., Counsel for Defendant, Carnation Company.

IN UNITED STATES DISTRICT COURT

REPLY OF UTAH PIE CO. TO COUNTERCLAIM OF CONTINENTAL BAKING CO.—Filed January 22, 1962

Comes now the plaintiff in the above-entitled cause and in reply to the Counterclaim of the defendant, Continental Baking Company, admits, denies, and alleges as follows, to wit:

1. The plaintiff denies each and every allegation contained in paragraphs 2 and 3 of the Counterclaim filed by the defendant, Continental Baking Company.

Wherefore, plaintiff prays that said defendant take nothing by its Counterclaim and that said Counterclaim be dismissed with cost.

King and Hughes, By Robert W. Hughes.

Of Counsel: Joseph L. Alioto; Joseph Bertain.

[fol. 24]

IN UNITED STATES DISTRICT COURT

MOTION FOR PRODUCTION OF DOCUMENTS PURSUANT TO RULE 34—Filed January 25, 1962

Comes now the plaintiff and *respectively* moves the Court for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure requiring the defendants, the Carnation Company and the Continental Baking Company, to produce for inspection the following documents:

1. All books, records, memoranda, correspondence, invoices, and all other documents and papers relating to the sale of frozen pies by the Carnation Company and the Continental Baking Company between January 1, 1955, and January 1, 1962.

2. All price lists, price quotations, all promotional allowances, advertising allowances, special deal allowances, price surveys, competitive reports compiled, extended, offered, and printed concerning the sale and distribution or offer of sale and contemplated distribution of frozen pies in the States of Utah, Idaho, Washington, Oregon, Montana, Colorado, and Wyoming between January 1, 1955 and January 1, 1962.

3. Copies of correspondence, minutes of meetings, or offers extended to any other pie manufacturing company concerning the marketing, sale, or distribution of frozen pies in any of the States mentioned in paragraph 2 above, between January 1, 1955, and January 1, 1962.

4. All books, records, memoranda, encompassing the cost of production, the purchase of ingredients and component parts for the manufacture and packaging of frozen pies, together with the records of shipping costs of both private and public carrier, for the sale and distribution of frozen pies in the States set forth in paragraph 2 by defendants Carnation Company and Continental Baking Company between January 1, 1955 and January 1, 1962.

5. All interoffice correspondence, memoranda, salesmen's reports, lists of salesmen and distributors of Carnation Company concerning the Salt Lake office for distribution of pies within the States of Utah, Idaho, Washington, Oregon, Montana, Colorado, and Wyoming between January 1, 1955, and January 1, 1962.

King and Hughes, By Robert W. Hughes, Attorneys for Plaintiff.

Of Counsel: Joseph L. Alioto.

* * * * * * *

[fol. 25] The court ordered both sides to answer all interrogatories and to produce all documents requested.

Plaintiff is to prepare order for answer to interrogatories.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF CONTINENTAL BAKING COMPANY—Filed June 25, 1962

Comes now the Continental Baking Company and, for answer to the complaint states as follows:

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

1. Defendant admits that the complaint is alleged to be filed and the proceedings instituted under Sections 15 and 26 of Title 15 U.S.C.A.

2. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 2.

3. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 3.

[fol. 26] 4. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5, except that it denies that its principal place of business is in New York City, New York and affirmatively alleges and avers that its principal place of business is in Rye, New York.

6. Defendant admits that it markets its frozen pies under the name and label of "Morton" throughout most areas of western United States, some of which frozen pies are manufactured at Watsonville, California. Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph insofar as they relate to defendant Carnation or defendant Pet except that defendant denies that it ever entered into any agreement with defendant Carnation or with defendant Pet, or with both, as alleged. Defendant denies the remaining allegations of paragraph 6.

7. Defendant denies the allegations of paragraph 7.

8. Defendant denies the allegations of paragraph 8.

9. Defendant denies the allegations of paragraph 9.

10. Defendant denies the allegations of paragraph 10.

11. Defendant denies the allegations of paragraph 11.

Third Defense

1. Defendant incorporates and realleges herein the matters contained in paragraphs 1 through 11 of the Second Defense.

2. Answering further, defendant alleges that any discrimination in prices charged by defendant within the meaning of Section 2(a) of the Clayton Act, as amended, 15 U.S.C. 13(a), was made in good faith to meet an equally low price of a competitor.

Fourth Defense

1. Defendant incorporates and realleges herein the matters contained in paragraphs 1 through 11 of the second Defense.

[fol. 27] 2. Answering further, defendant alleges that any differential complained of by plaintiff in prices charged by defendant for its frozen pies made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered.

Fifth Defense

1. Defendant incorporates and realleges herein the matters contained in paragraphs 1 through 11 of the Second Defense.

2. Answering further, defendant alleges that any discrimination in prices charged by defendant within the meaning of Section 2(a) of the Clayton Act, as amended, 15 U.S.C. 13(a), was the result of price changes from time to time in response to changing conditions affecting the market for its products.

Counterclaim

Defendant, Continental Baking Company, counterclaims against plaintiff as follows:

1. The Court has jurisdiction over this counterclaim under Title 15 U.S.C. §§15 and 26.

2. Within the four years last past, and continuing to the present time, plaintiff has discriminated and offered to discriminate in price between different purchasers of its frozen fruit pies of like grade and quality in that certain purchasers have been permitted to purchase from plaintiff frozen fruit pies of its manufacture at a lesser price than plaintiff made frozen fruit pies of like grade and quality available to other purchasers.

3. By reason of the aforesaid price discriminations, all in violation of Section 2(a) of the Clayton Act, as amended, the business of the defendant has been seriously impaired and damaged and the defendant has suffered loss of profits and loss to its good will. Damage within the four years immediately preceding, as a result of plaintiff's violations of the Clayton Act, as amended, was Seventy-Five Thousand Dollars ($75,000).

Wherefore, the defendant prays as follows:

1. That defendant, Continental Baking Company, re-[fol. 28] ceive, with interest, as damages for the injury to its business the sum of Seventy-Five Thousand Dollars ($75,000) trebled, and that the Court award a reasonable attorney's fee;

2. That the plaintiff be enjoined and restrained from the unlawful practices hereinbefore alleged;

3. That the Court issue a preliminary injunction restraining the plaintiff from its practice of discriminatory pricing, as hereinbefore alleged;

4. That defendant recover its costs herein;

5. That defendant have such other and further relief as may be proper in the premises.

Callister & Kesler, By A. Pratt Kesler.

Of counsel: Covington & Burling.

IN UNITED STATES DISTRICT COURT

AMENDED COUNTERCLAIM OF CONTINENTAL BAKING COMPANY—Filed August 24, 1962

Defendant, Continental Baking Company, counterclaims against plaintiff as follows:

Count I

1. The Court has jurisdiction over this counterclaim under Title 15 U.S.C. §§ 15 and 26.

2. Within the four years last past, and continuing to the present time, plaintiff has discriminated and offered to discriminate in price between different purchasers of its frozen fruit pies of like grade and quality in that certain purchasers have been permitted to purchase from plaintiff frozen fruit pies of its manufacture at a lesser price than plaintiff made frozen fruit pies of like grade and quality available to other purchasers.

3. By reason of the aforesaid price discriminations, which are in violation of Section 2(a) of the Clayton Act, [fol. 29] as amended, 15 U.S.C. §13(a) (1959), and which constitute an unlawful misuse of plaintiff's dominant market position and attempt to monopolize, all in violation of 15 U.S.C. §2 (1959), the business of the defendant has been seriously impaired and damaged and the defendant has suffered loss of profits and loss to its good will. Damage within the four years immediately preceding, as a result of plaintiff's violations of the Clayton Act, as amended, was Seventy-Five Thousand Dollars ($75,000).

Count II

1. The Court has jurisdiction over this counterclaim under Title 15 U.S.C. §§ 15 and 26.

2. Within the four years last past, and continuing to the present time, plaintiff has discriminated in the course of its commerce among its customers in that plaintiff has consistently offered to pay, and has paid, substantial sums of money to some of its customers in consideration of services or facilities furnished by such customers in connection with the sale and offering for sale of products manufactured and sold by plaintiff, but has failed to make such payments available on proportionally equal terms to all other customers competing in the distribution of plaintiff's products.

3. By reason of the aforesaid discriminations, which are in violation of Section 2(d) of the Clayton Act, as amended, 15 U.S.C. 13(d) (1959), and which constitute an unlawful misuse of plaintiff's dominant market position and attempt to monopolize, all in violation of 15 U.S.C. §2 (1959), the business of the defendant has been seriously impaired and damaged and the defendant has suffered loss of profits and loss to its good will. Damage within the four years immediately preceding, as a result of plaintiff's violations of the Clayton Act, as amended, was Seventy-Five Thousand Dollars ($75,000).

Wherefore, the defendant prays separately as to each Count as follows:

1. That defendant, Continental Baking Company, receive with interest, as damages for the injury to its business, the sum of Seventy-Five Thousand Dollars ($75,000) trebled, and that the Court award a reasonable attorney's fee;

[fol. 30] 2. That the plaintiff be enjoined and restrained from the unlawful practices hereinbefore alleged;

3. That the Court issue a preliminary injunction restraining the plaintiff from its practice of discriminatory pricing, as hereinbefore alleged;

4. That defendant recover its costs herein;

5. That defendant have such other and further relief as may be proper in the premises.

Defendant demands trial by jury.

Callister & Kesler, By A. Pratt Kesler, Esquire.

Of Counsel: Covington & Burling.

In United States District Court

Pretrial Order—August 31, 1962

This cause coming on for pretrial before the Honorable Willis W. Ritter, Chief Judge, District of Utah, on the 24th day of August, 1962, the plaintiff being represented by Joseph L. Alioto, Esq., G. Joseph Bertain, Esq., and Robert W. Hughes, Esq.; defendant Carnation being represented by Peter W. Billings, Esq., and James R. Baird, Jr., Esq.; defendant Pet being represented by George P. Lamb, Esq., and Paul Thatcher, Esq.; defendant Continental being represented by John H. Schafer, Esq., and A. Pratt Kesler, Esq.,

Now, Therefore, upon the statements of counsel for the respective parties as to the issues of law and fact to be tried, the following summary of said issues is hereby made and ordered filed herein:

1. Whether or not defendants combined and conspired to restrain trade and to monopolize trade and to violate Section 2(a) of the Clayton Act by doing the following things in the states in which the plaintiff markets its frozen pies, namely, Utah, Idaho, Washington, Oregon, Wyoming, and Colorado:

[fol. 31] a. selling at unreasonably low prices while maintaining higher prices in another area and subsidizing their low prices from the higher prices charged in the other area,

b. selling below cost of production and distribution for the purpose of injuring plaintiff and destroying its business and impairing its capital structure, and

c. keeping their prices low and below cost as the result of price-fixing agreements among themselves or price-maintenance agreements between themselves and their respective distributors within the states of Utah, Idaho, Washington, Oregon, Wyoming, and Colorado.

2. Whether all of these things were done for the purpose of injuring the business of the plaintiff.

3. Whether or not these acts had an impact on plaintiff and whether or not that injurious impact is capable of being measured by the relevant economic evidence.

4. What, if any, damages the plaintiff is entitled to recover.

5. Whether or not defendants lost money pursuant to an attempt to destroy the plaintiff.

6. Whether or not the differences in prices, if any, between the various schedules described by the plaintiff were the result of good-faith meeting of competition within the meaning of Section 2(a).

7. Whether or not any lower price complained of by the plaintiff was caused by, among other things, changing conditions affecting the marketing of the goods involved.

8. Whether or not any lower price complained of by the plaintiff was a lower price only to make due allowance for different methods of manufacturing, sale, and delivery of the goods.

9. Whether or not plaintiff has discriminated in price in the sale of its products to the injury of defendant Continental.

10. Whether or not plaintiff has discriminated among competing purchasers in the granting of advertising and promotional allowances to some of these purchasers, but not to others, to the injury of defendant Continental.

[fol. 32] 11. Whether or not these discriminations by plaintiff, if any, constitute a monopolization, or an attempt to monopolize, in violation of Section 2 of the Sherman Act.

All other issues are stipulated out of the case.

Willis W. Ritter, Chief Judge.

Dated at Salt Lake City, Utah, this 31st day of August, 1962.

IN UNITED STATES DISTRICT COURT

CONTINENTAL BAKING COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND SEVERANCE—Filed November 20, 1962

Comes now defendant, Continental Baking Company and moves this Court, pursuant to Rules 56 and 20 of the Federal Rules of Civil Procedure, for the entry of partial summary judgment in favor of Continental Baking Company and against plaintiff, Utah Pie Company on the claim by the Utah Pie Company that Continental Baking Company has conspired with Pet Milk Company and Carnation Company to restrain trade, to monopolize trade, and to impair or destroy the plaintiff as a competitor in the manufacture and sale of frozen fruit pies; and to sever plaintiff's remaining claim against Continental Baking Company from the claims stated against the defendants Pet Milk Company and Carnation Company, and order the remaining claim against Continental Baking Company to be tried separately.

The grounds for this Motion, as more fully stated in the memorandum submitted in support hereof, are that the depositions on file, the answers to the interrogatories heretofore filed and the documents and records produced by the parties pursuant to the orders of this court show that there is no genuine issue as to any material fact, and on the basis of the undisputed facts of record Continental Baking Company is entitled to judgment as a matter of law; and, the remaining claims stated against the defendant Continental Baking Company and the defendants Pet Milk Company and Carnation Company do not arise out of the same transaction or occurrence or series of transactions or occurrences, nor will any question of law or fact common to the defendants arise in the action.

John H. Schafer; Robert J. Muth, Attorneys for Defendant, Continental Baking Company.

Of counsel: Roy M. Anderson, Esq., Vice President and General Counsel, Continental Baking Company, Date: November 15, 1962.

[fol. 33]

IN UNITED STATES DISTRICT COURT

CARNATION COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND SEVERANCE—Filed November 21, 1962

Comes now defendant Carnation Company and moves this Court, pursuant to Rules 56 and 20 of the Federal Rules of Civil Procedure, for the entry of partial summary judgment in favor of Carnation Company and against plaintiff, Utah Pie Company, on the claim by the Utah Pie Company that Carnation Company has conspired with Pet Milk Company and Continental Baking Company to restrain trade, to monopolize trade, and to impair or destroy the plaintiff as a competitor in the manufacture and sale of frozen fruit pies; and to sever plaintiff's remaining claims against Carnation Company from the claims stated against the defendants Pet Milk Company and Continental Baking Company, and order the remaining claims against Carnation Company to be tried separately.

The grounds for this Motion are that the records, pleadings and orders in this case, the depositions on file, the answers to the interrogatories heretofore filed and the documents and records produced by the parties pursuant to the orders of this court show that there is no genuine issue as to any material fact as to the alleged conspiracy, and on the basis of the undisputed facts of record Carnation Company is entitled to judgment as a matter of law; and, the remaining claims stated against the defendant Carnation Company and the defendants Pet Milk Company and Continental Baking Company do not arise out of the same transaction or occurrence or series of transactions or occurrences, nor will any question of law or fact common to the defendants arise in the action.

Dated this 21st day of November, 1962.

James R. Baird, Jr., Peter W. Billings, Attorneys for Defendant Carnation Company, By Peter W. Billings.

[fol. 34]

IN UNITED STATES DISTRICT COURT

MOTION OF UTAH PIE COMPANY FOR LEAVE TO ADD ADDITIONAL ISSUE—Filed December 3, 1962

Plaintiff, Utah Pie Company, through its attorneys, moves to add an additional issue to the Court's Pre-Trial Order of August, 1962.

The grounds for this motion are that since the court entered its Pre-Trial Order additional facts have been developed through discovery which establish that defendants have not operated their frozen pie businesses profitably and that there are questions of disputed fact as to the source of funds which aid defendants in remaining in the frozen pie business. No delay in trial can result from the allowance of the proposed additional issue and the interests of justice will be served by granting this motion.

Accordingly, plaintiff prays leave to add the following proposed issue:

"Whether or not each of the defendants subsidized their unreasonably lower prices, losses and sales below cost in areas where they compete with plaintiff from corporate profits or sales derived from their profitable non-frozen pie interstate operations."

Respectfully submitted,

Robert W. Hughes

Of Counsel: Joseph L. Alioto; Joseph Bertain.

In United States District Court

Minute Entry—January 4, 1963

This matter came before the court at 10:00 a.m. for hearing. Robert W. Hughes, Esq. and G. Joseph Bertain, Esq. appeared for the plaintiff. The following representations were made on behalf of the defendants: Peter W. Billings, Esq. and G. K. Handley, Esq. appeared for defendant, Carnation Company; Paul Thatcher, Esq. and George Lamb, Esq. appeared for defendant, Pet Milk Company; and A. Pratt Kesler, Esq. and John H. Schaefer, Esq. appeared for defendant, Continental Baking Company.

Statements of counsel were heard.

[fol. 35] The court granted plaintiff's motion to file additional issues.

The plaintiff was allowed until January 11, 1963 within which to answer interrogatories.

Each defendant's motion for partial summary judgment was continued for hearing to January 21, 1963 at 2:00 p.m.

Minute Entry—January 21, 1963

This matter came before the court at 11:30 a.m. for hearing. Robert W. Hughes, Esq., G. Joseph Bertain, Esq., and Joseph Alioto, Esq. appeared for the plaintiff. The following representations were made on behalf of the defendants: Peter W. Billings, Esq. and G. K. Handley, Esq. appeared for defendant, Carnation Company; Paul Thatcher, Esq. and George Lamb, Esq. appeared for defendant, Pet Milk Company; and A. Pratt Kesler, Esq. appeared for defendant, Continental Baking Company.

Mr. Lamb moved for summary judgment on behalf of each of the defendants as to Count 1 of the complaint and moved for severance on behalf of each of the defendants as to Count 2 of the complaint.

The hour of noon having arrived, court recessed to 2:00 p.m.

Court reconvened at 2:00 p.m. with counsel as heretofore listed present.

Counsel stipulated that all jurors were out of the court room.

Statements of counsel were heard. The court denied each defendant's motion for summary judgment as to Count 1 of the complaint and denied each defendant's motion for severance as to Count 2 of the complaint.

Plaintiff's motion to vacate notice of taking deposition was granted by the court.

Jury trial of this matter was set for February 4, 1963 at 10:00 a.m.

[fol. 36]

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION FOR PRODUCTION OF DOCUMENTS —February 5, 1963

Good cause appearing, it is hereby ordered that defendant Continental Baking Company produce all writings in its custody or control which relate to:

1. The differences in cost between the production of a 24 oz. apple pie and a 22 oz. apple pie.

2. The differences between the formula for producing Bel-Air apple pie for Safeway and Morton apple pie for Safeway.

Production shall be made before the close of business, Wednesday, February 6, 1963, unless excused for good cause shown in advance.

Willis W. Ritter, Chief Judge.

[fol. 36A]

IN UNITED STATES DISTRICT COURT

VERDICT—February 22, 1963

We, the jury duly empanneled in the above-entitled case, find as follows:

Defendant Continental Baking Company has individually and independently discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere, in violation of Section 2 of the Clayton Act, and thereby proximately caused plaintiff damage in the amount of $24 994.

~~Defendant Continental Baking Company has not independently and individually violated Section 2 of the Clayton Act.~~

Strike out the statement which does not apply.

Dated: this 22 day of February, 1963, at Salt Lake City, Utah.

Frank Couture, Foreman.

IN UNITED STATES DISTRICT COURT

VERDICT—February 22, 1963

We, the jury duly *empanneled* in the above-entitled case, find as follows:

Defendant Pet Milk Company has individually and independently discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere, in violation of Section 2 of the Clayton Act, and thereby proximately caused plaintiff damage in the amount of $44,197.

~~Defendant Pet Milk Company has not independently and individually violated Section 2 of the Clayton Act.~~

Strike out the statement which does not apply.

Dated: this 22 day of February, 1963, at Salt Lake City, Utah.

Frank Couture, Foreman.

[fol. 37]

IN UNITED STATES DISTRICT COURT

VERDICT—February 22, 1963

We, the jury duly *empanneled* in the above-entitled case, find as follows:

Defendant Carnation Company has individually and independently discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere, in violation of Section 2 of the Clayton Act, and thereby proximately caused plaintiff damage in the amount of $29,277.

~~Defendant Carnation Company has not independently and individually violated Section 2 of the Clayton Act.~~

Strike out the statement which does not apply.

Dated: this 22 day of February, 1963, at Salt Lake City, Utah.

Frank Couture, Foreman.

IN UNITED STATES DISTRICT COURT

VERDICT—February 22, 1963

We, the jury duly impaneled in the above entitled case, find as follows:

The following defendants have conspired to fix the prices at which they would sell frozen pies in the Utah trading area and thereby caused plaintiff damage:

(Strike out the name of any defendant which has not conspired, or leave the statement as it is if you find that the three defendants have conspired)

~~Carnation Company~~)
~~Continental Baking~~)
~~Company~~
~~Pet Milk Company~~)

Damages proximately caused by the conspiracy

$.....

Dated this 22 day of February, 1963 at Salt Lake City, Utah.

Frank Couture, Foreman.

[fol. 38]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF FEBRUARY 22, 1963

* * * * * * *

"We, the jury duly impaneled in the above entitled case, find as follows:

The following defendants have conspired to fix the prices at which they would sell frozen pies in the Utah trading area and thereby caused plaintiff damage:

(Strike out the name of any defendant which has not conspired, or leave the statement as it is if you find that the three defendants have conspired)

~~Carnation Company~~)
~~Continental Baking~~)
~~Company~~
~~Pet Milk Company~~)

Damages proximately cause
by the conspiracy

$.....

Dated this 22 day of February, 1963 at Salt Lake City, Utah.

/s/ Frank S. Couture, Foreman."

The court directed the verdicts filed of record.

* * * * * * *

IN UNITED STATES DISTRICT COURT

JUDGMENT ON COUNTER-CLAIM—Entered February 25, 1963

The defendant Continental Baking Company having filed a counter claim against plaintiff charging plaintiff with violations of Section 2(a) of the Clayton Act; the jury having found, after trial, that the plaintiff violated Section 2(a) of the Clayton Act, and having awarded Continental Baking Company damages in the sum of $1.00; plaintiff having filed a motion for judgment notwithstanding verdict; and the Court having granted the said motion;

It Is Hereby Ordered that the said counter claim be dismissed and that judgment be entered in favor of plaintiff and against Continental Baking Company on the said counter claim.

Dated: February 23, 1963.

Willis W. Ritter, Chief Judge.

[fol. 39]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered February 25, 1963

The plaintiff having filed its complaint herein on September 8, 1961, charging the three defendants with a violation of Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act, as amended; the defendants having answered by denying they collectively violated Sections 1 and 2 of the Sherman Act and by denying that each violated Section 2(a) of the Clayton Act as amended; the matter having been tried before a jury, duly impaneled in this Court, beginning on February 4, 1963; the jury having heard the evidence and arguments of counsel; the Court having instructed the jury upon the law relating to the statutes, in question; the jury having deliberated and

returned its verdict on February 22, 1963 in favor of defendants on the Section 1 and 2 claims and in favor of plaintiff on the claim under Section 2(a) of the Clayton Act; the jury having assessed damages against the defendants as follows:

Continental Baking Company	$24,994
Pet Milk Company	$44,197
Carnation Company	$29,277

and the Court having granted plaintiff's motion to treble the said amounts as required by Section 4 of the Clayton Act and to grant plaintiff's attorneys fees and costs pursuant to the said Section 4 of the Clayton Act;

Now, Therefore, It Is Hereby Ordered:

1) That plaintiff shall have judgment against the Continental Baking Company for damages in the amount of $74,982; for attorneys' fees in the amount of $14,000; and for costs in the amount of $.....; and

2) That plaintiff shall have judgment against Pet Milk Company for damages in the amount of $132,591; for attorneys' fees in the amount of $20,000 and for costs in the amount of $.....; and

3) That plaintiff shall have judgment against Carnation Company for damages in the amount of $87,831; for attorneys' fees in the amount of $16,000; and for costs in the amount of $.....

Dated: February 23, 1963.

Willis W. Ritter, Chief Judge.

[fol. 40]

IN UNITED STATES DISTRICT COURT

DECREE—February 23, 1963

The plaintiff having filed its complaint herein on September 8, 1961, charging the three defendants with a violation of Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act, as amended; the defendants having answered by denying they collectively violated Sections 1 and 2 of the Sherman Act and by denying that each violated Section 2(a) of the Clayton Act, as amended; the matter having been tried before a jury, duly impaneled in this Court, beginning on February 4, 1963; the jury having heard the evidence and arguments of counsel; the Court having instructed the jury upon the law relating to the statutes in question; the jury having deliberated and returned its verdict on February 22, 1963 in favor of defendants on the Section 1 and 2 claims and in favor of plaintiff on the claim under Section 2(a) of the Clayton Act; the jury having assessed damages against the defendants as follows:

Continental Baking Company	$24,994
Pet Milk Company	$44,197
Carnation Company	$29,277

and the Court having granted plaintiff's motion to treble the said amounts as required by Section 4 of the Clayton Act and to grant plaintiff's attorneys fees and costs pursuant to the said Section 4 of the Clayton Act; the Court having entered judgment thereon; plaintiff having applied to the Court for injunctive relief under the provisions of 15 U. S. C. 26; and the Court having heard all of the evidence and arguments of counsel in the case;

It Is Hereby Ordered, Adjudged And Decreed:

1) That each of the defendants has violated Section 2(a) of the Clayton Act by maintaining and charging lower

prices in the trading area of plaintiff (Utah, Idaho, Washington, Montana and Colorado) than in the State of California where defendants' production facilities are located; and

2) That each defendant, its officers, representatives, agents and employees, shall not sell frozen fruit pies in the states of Utah, Idaho, Washington, Montana and Colorado at prices lower than prices charged in the State of California, (or, in the case of Continental for the state of Colorado, the prices charged in Iowa), for goods of like grade and quality; and

[fol. 41] 3) Jurisdiction of this cause is retained to permit any party to apply to the Court to modify or to vacate this decree in the light of any circumstances that shall make it just or reasonable that this decree be modified or vacated.

Dated: February 23, 1963.

Willis W. Ritter, Chief Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION—March 4, 1963

Come now the parties to the above entitled action and stipulate that the decree may be amended by interlineation so as to change the words "shall not sell frozen fruit pies" contained on Page 2 of the decree, to the words "shall not sell 8 inch frozen fruit pies of the flavors apple, cherry, boysenberry, peach, pumpkin and mince.

The purpose of this stipulation is to limit the application of the decree to the issues of the trial, and defendants expressly reserve all objections to said decree heretofore expressed.

Dated this 4th day of March, 1963.

Robert W. Hughes, Attorney for Plaintiff Utah Pie; Peter W. Billings, Attorney for Defendant, Carnation Company; Paul Thatcher, Attorney for Defendant, Pet Milk Company; A. Pratt Kesler, Attorney for Defendant, Continental Baking Co.

[fol. 42]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN SUPPORT OF ATTORNEYS' FEES—
Filed February 23, 1963

State Of Utah County Of Salt Lake) ss.

Joseph L. Alioto, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the plaintiff in this action; that he and his associates in this action have spent approximately 3,100 hours in the preparation and trial of the case.

Joseph L. Alioto—Affiant.

Subscribed and sworn to before me this 23d day of February, 1963.

Phyllis V. Porter, Notary Public, Residing at Salt Lake City, Utah.

(Seal)

My commission expires:

March 16, 1966

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL—Filed February 28, 1963

Defendant Carnation Company moves the court to set aside the verdict entered in the above-entitled action on February 22, 1963, and the judgment entered thereon February 25, 1963, and to enter judgment in favor of defendant Carnation Company and against the plaintiff Utah Pie Company in accordance with the motion for a directed verdict made by said defendant Carnation Company at the close of plaintiff's case and at the close of all the tes-

timony herein on the grounds that the plaintiff has failed to establish:

(1) That defendant Carnation Company did unlawfully discriminate in prices as charged; or

(2) That any discrimination in prices charged by defendant Carnation Company had the reasonable possibility of injuring competition or tending to create a monopoly in any market area served by the plaintiff; or

[fol. 43] (3) That any discrimination in price charged by defendant Carnation Company had any injurious impact on plaintiff's business or property.

In the alternative, defendant Carnation Company moves the court to set aside the verdict and the judgment and the decree entered thereon and grant said defendant Carnation Company a separate new trial on the issue of alleged violation of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act on the following grounds:

(1) The verdict is not supported by the evidence and is contrary to the evidence.

(2) The verdict is contrary to law.

(3) The verdict is contrary to the law and the evidence.

(4) The court erred in denying defendant's motion for a directed verdict at close of plaintiff's case and at close of all the evidence.

(5) The damages awarded by the jury against this defendant are excessive in amount and not supported by the evidence.

(6) The court failed to order a special verdict or a general verdict with special interrogatories as requested by defendants.

(7) The court erred in its refusal to grant Carnation Company's motion for severance and in its rulings that all evidence submitted against one defendant should be admitted against all.

(8) Errors in admission and exclusion of evidence throughout the trial.

(9) The overruling of defendants' objections to and motions to strike certain false and inflammatory statements made by counsel for plaintiff in his closing argument to the jury.

(10) Errors of the court in its instructions to the jury and its refusal to grant defendants' requests for instructions.

[fol. 44] (11) The decree is not supported by sufficient or by any findings of the court.

Peter W. Billings, Esq., Attorney for Defendant Carnation Company.

IN UNITED STATES DISTRICT COURT

MOTION TO ALTER OR AMEND THE DECREE AND TO SUSPEND THE INJUNCTION—Filed February 28, 1963

Defendant Carnation Company moves the court to alter or amend the decree heretofore entered in this action under date of February 23, 1963,

1. To define frozen fruit pies as being 8" frozen fruit pies of the flavors apple, cherry, boysenberry, peach, pumpkin or mince; and

2. To eliminate the states of Washington, Montana and Colorado so far as said decree enjoins this defendant, its officers, representatives, agents and employees from selling its pies in said states at prices lower than those charged in the State of California for goods of like grade and quality; on the grounds that:

(a) The issues in this action involved only the sale of 8" frozen fruit pies in the flavors of apple, cherry, boysen-

berry, peach, pumpkin and mince, whereas the words "frozen fruit pies" as used in the decree could be construed to include pies of other sizes and flavors; and

(b) There is no evidence whatever of injury to the plaintiff from acts of the defendant Carnation Company which occurred in states other than Utah and Idaho or that this defendant had discriminated in price so far as the states of Washington, Montana or Colorado are concerned.

Defendant Carnation Company further moves the court to suspend the injunction pending the appeal herein which defendant Carnation Company desires and proposes to take, upon the filing of a bond in such amount as the court may direct. Suspension or modification of the injunction is sought upon the grounds that:

[fol. 45] (1) The injunction goes beyond the provisions of section 2(a) and (b) of the Clayton Act as amended.

(2) The injunction is contrary to law and deprives the defendant Carnation Company of the ability to compete within the provisions of section 2 of the Clayton Act in the sale of frozen fruit pies in the areas covered by the injunction.

(3) The injunction subjects Carnation Company to irreparable injury in that if this defendant complies with the injunction it will not be able to compete in the designated areas and will lose its customers and if it does not comply with the injunction, it will be in contempt of court.

(4) The injunction as now in effect enjoins this defendant from actions as to which there is no evidence of any illegality on the part of this defendant.

If the injunction be not suspended, defendant Carnation Company moves that the injunction be amended to permit this defendant, its officers, representatives, agents or employees to sell 8" frozen fruit pies in the states of Utah, Idaho, Washington, Montana, Colorado at prices lower

than prices charged in California for goods of like grade and quality when such lower prices do not tend to substantially lessen competition or tend to create a monopoly or when they make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from different methods or quantities in which frozen fruit pies are sold or delivered to different purchasers, or when price changes are made in response to changing conditions affecting the market for the goods concerned or when a price is lowered in good faith to meet an equally low price of a competitor.

Peter W. Billings, Attorney for Defendant, Carnation Company.

[fol. 46]

IN UNITED STATES DISTRICT COURT

DEFENDANT PET MILK COMPANY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, AND, IN THE ALTERNATIVE, FOR NEW TRIAL—Filed February 28, 1963

Defendant Pet Milk Company moves the court to set aside the verdict of the jury and the decree and judgment entered against it, and to enter judgment in favor of the defendant Pet Milk Company in accordance with its Motion for Dismissal and for a Directed Verdict, pursuant to Rules 41(b) and 50(a) of the Federal Rules of Civil Procedure; or, if the foregoing motion be denied, to set aside the verdict and the Decree of Injunction and the Judgment entered thereon, and to grant defendant Pet Milk Company a separate new trial on the issue of the alleged violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, pursuant to Rule 59. Said motions are made upon the following grounds and for the following reasons:

1. The verdict, judgment and decree are, and each of them, is, contrary to law.

2. The verdict, judgment and decree are not, and each of them is not supported by the evidence, but is contrary to the evidence.

3. The decree and injunction is not supported by sufficient or by any findings of the trial court, and the verdict of the jury is insufficient to support the same.

4. The court erred in denying defendant Pet Milk Company's motion for dismissal and to direct a verdict in its favor at the close of the plaintiff's case.

5. The court erred in denying this defendant's motions for severance and for a separate trial.

6. There is no sufficient or substantial relevant material and competent evidence to support the amount of the jury's verdict, and the amount thereof is excessive.

7. The court erred in admitting and refusing to admit evidence, and in instructing the jury, and in refusing to grant this defendant's requests for jury instructions, exceptions to which errors were duly made by defendant Pet Milk Company and are apparent in the record.

[fol. 47] 8. The court erred in overruling this defendant's objections to and motions to strike certain false and *inflamatory* statements made by counsel for plaintiff in his closing arguments to the jury.

Dated: February 28, 1963.

Signed Paul Thatcher, Attorney for Pet Milk Company.

In United States District Court

Pet Milk Company's Motions to Alter or Amend the Decree of Injunction and to Suspend the Injunction —Filed March 1, 1963

Pet Milk Company, a defendant in the above entitled action, pursuant to Rule 59 (e), Federal Rules of Civil Procedure, separately moves the court, to alter or amend the decree and injunction heretofore entered in this cause under date of February 23, 1963, in each of the following particulars:

1. To define the term "frozen fruit pies" as used therein as being 8-inch frozen fruit pies of the flavors apple, cherry, bosenberry, peach, pumpkin, and mince; and

2. To eliminate therefrom the states of Washington, Montana and Colorado insofar as said decree enjoins this defendant Pet Milk Company, its officers, representatives, agents and employees from selling its pies in said states at prices lower than those charged in the state of California for goods of like grade and quality; and

3. To permit the defendant Pet Milk Company, its officers, representatives, agents and employees to sell frozen fruit pies in the state or states affected by said decree and injunction at prices lower than prices charged in California for goods of like grade and quality, when such lower prices do not tend substantially to lessen competition or tend to create a monopoly; or when such prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which frozen fruit pies are sold or delivered to different purchasers; or when price changes are made in response to changing conditions affecting the market for the goods concerned; or when a price is lowered in good faith to meet an equally low price of a competitor.

[fol. 48] Said motions are made on the grounds that:

(A) The terms of said decree exceed and are broader than the issues drawn and tried in said action, which were limited to the sale of 8-inch frozen fruit pies of the flavors specified; and

(B) There is no evidence and there are no findings and no verdict to support a decree and injunction against defendant Pet Milk Company with respect to the discrimination in the sale of its pies outside the states of Utah and Idaho, assuming without conceding that the same is supported with respect to the sale of pies in said states; and

(C) The injunction as granted and entered goes beyond the provisions of Sections 2(a) and (b) of the Clayton Act and deprives the defendant Pet Milk Company of the ability to compete in the sale of frozen pies in the area covered by the injunction within the provisions of Section 2 of the Clayton Act.

Defendant Pet Milk Company further and separately moves the court for a stay and suspension of the injunction heretofore granted in this cause pending the appeal which defendant Pet Milk Company desires and intends to take from the decree of the court granting the injunction and from the judgment entered in this cause on February 23, 1963, upon the filing of a bond in such amount as the court may direct.

The said motion for a stay and suspension of the injunction is made upon the grounds and for the reason that the injunction subjects the Pet Milk Company to irreparable injury in that, if it complies with the injunction pending said appeal it will not be able to compete in the designated areas and will lose its business and customers therein; and, if it does not comply with the injunction, it will be in contempt of court; and upon the further ground that a stay or suspension of said injunction is necessary, just and equitable in order to maintain the status quo of the parties.

Dated February 28, 1963.

Paul Thatcher, Attorney for Pet Milk Company.

[fol. 49]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 4, 1963

This matter came before the court at 10:30 a.m. for hearing. The plaintiff was represented by counsel, Robert W. Hughes, Esq. and Joseph L. Alioto, Esq. The defendants were represented as follows: Paul Thatcher, Esq. and George Lamb, Esq. for defendant, Pet Milk Company; Peter W. Billings, Esq. and G. K. Handley, Esq. for defendant, Carnation Company; and A. Pratt Kesler, Esq. for defendant, Continental Baking Company.

Statements of counsel were heard.

The court denied the following motions:

(1) Defendant, Carnation Company's motion to alter or amend the decree and to suspend the injunction.

(2) Defendant, Pet Milk Company's motion for judgment in accordance with motion for directed verdict, and, in the alternative for a new trial.

(3) Defendant, Carnation Company's motion for judgment notwithstanding the verdict or for a new trial.

(4) Defendant, Pet Milk Company's motion to alter or amend the decree of injunction and to suspend the injunction.

(5) Defendant, Pet Milk Company's motion to stay proceedings to enforce judgment and decree pending disposition of motions after entry of judgment.

The court signed a Judgment—re; renewal of motions for a directed verdict and dismissal of case as entered by defendant, Continental Baking Company, denying the motions of defendant, Continental Baking Company and directing that judgment be entered against said defendant.

The court fixed a supersedeas bond as to each defendant for the full amount of the judgment plus costs.

In United States District Court

Judgment—March 4, 1963

Defendant Continental Baking Company having moved for a directed verdict against plaintiff and for dismissal at the close of plaintiff's evidence; and having renewed such motions at the close of all the evidence, and after the return of the verdict of the jury; and having moved for [fol. 50] judgment in accordance with its motion for directed verdict; and having moved in the alternative for a new trial; and having stated grounds for the said motions; and the Court having considered such motions and the grounds therefor; and having ruled thereon;

It Is Hereby Ordered that all of the said motions of Continental Baking Company are hereby denied and judgment be entered thereon accordingly against Continental Baking Company.

Willis W. Ritter, Chief Judge.

Dated: March 4, 1963.

In United States District Court

Notice of Appeal by Carnation Company—Filed March 12, 1963

Notice Is Hereby Given that Carnation Company, one of the defendants above-named, hereby appeals to the Court of Appeals for the Tenth Circuit from:

(a) That part of the final judgment entered in this action on the 25th day of February, 1963, in favor of the plaintiff, Utah Pie Company, and against the defendant, Carnation Company;

(b) The decree in this action, dated February 23, 1963, insofar as it applies to defendant Carnation Company;

(c) The orders of the court, dated March 4, 1963, denying the motion of defendant Carnation Company for judgment notwithstanding the verdict or for a new trial, and denying all but paragraph 1 of the motion of defendant Carnation Company to alter or amend the decree and to suspend the injunction.

Dated March 12, 1963.

Peter W. Billings, Fabian & Clendenin, Attorneys for Carnation Company.

[A supersedeas bond was filed on behalf of Carnation Company on March 15, 1963.]

[fol. 51]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY PET MILK COMPANY—
Filed March 12, 1963

Notice is hereby given that Pet Milk Company, a defendant and the appellant herein, appeals to the United States Court of Appeals for the Tenth Circuit from the verdict and Final Judgment and the Decree of Injunction entered on February 23, 1963, by the above entitled Court in the above entitled cause in favor of the plaintiff, Utah Pie Company, the Appellee herein, and against the appellant, Pet Milk Company, and from the orders of the court entered in this action March 4, 1963, denying the motions of defendant Pet Milk Company for judgment in its favor notwithstanding the verdict, or, in the alternative, for a new trial of the issues presented under Section 2(a) of the Clayton Act, and for amendment and alteration of the Decree of Injunction, and for suspension thereof.

Dated March 8th, 1963.

Paul Thatcher, Attorney for Pet Milk Company.

[An appeal bond was filed on behalf of Pet Milk Company on March 12, 1963.]

In United States District Court

Notice of Appeal by Continental Baking Company—Filed March 6, 1963

Notice is hereby given that Continental Baking Company, a Delaware corporation, one of the defendants in the above-captioned action, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgments and order of the District Court for the District of Utah awarding treble damages, attorneys' fees and costs, and granting injunctive relief, all against Continental Baking Company, and in favor of the Utah Pie Company, appellee herein, and denying Continental Baking Company's renewed motions for dismissal, for a directed verdict, and for the entry of judgment in accordance with its motion for directed verdict, and in the alternative for a new trial, on the claim by the Utah Pie Company that Continental Baking Company violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. §13), which judgments were entered on or about [fol. 52] February 25, 1963, and March 5, 1963; and from the final judgment and orders of the District Court for the District of Utah, in favor of the appellee and against the appellant on appellant's counterclaim for treble damages, attorneys' fees and costs, and for injunctive relief, by reason of appellee's violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13), also entered on or about February 25, 1963, which judgment was entered pursuant to judgment of the Court denying Continental's motion to enter judgment on the verdict of the jury, and granting appellee's motion to enter judgment notwithstanding the verdict in favor of Continental Baking Company.

A. Pratt Kesler, Attorney for Appellant, Continental Baking Company.

March , 1963

Of Counsel: John H. Schafer, Covington & Burling.

[An appeal bond was filed on behalf of Continental Baking Company on March 6, 1963. A supersedeas bond was filed on behalf of Continental Baking Company on March 29, 1963.]

IN UNITED STATES DISTRICT COURT

Transcript of Proceedings—February 4, 1963

Salt Lake City, Utah

Before: The Honorable Willis W. Ritter, Chief Judge.

APPEARANCES:

For the Plaintiff: Robert W. Hughes, G. Joseph Bertain, Joseph L. Alioto, Matthew Mitchell.

For Defendant Carnation: Peter W. Billings, James R. Baird, Jr.

For Defendant Pet: Paul Thatcher, George P. Lamb, Carrington Shields.

For Defendant Continental: A. Pratt Kesler, John H. Schafer.

STATEMENT BY MR. ALIOTO FOR THE PLAINTIFF

Mr. Alioto: * * * At or about this time, to be exact, in November of 1955, the Continental Baking Company purchased a frozen food company called the Morton Frozen Food Company.

* * * * * * *

Despite this determination by the board of directors that there was a good will value of $3 million in Morton Frozen [fol. 53] Foods, the company management immediately planned a campaign of selling at a loss—they claimed to establish the market—selling at a loss in order to gain position; and they projected losses, they planned losses. The losses did not arise, as the evidence will show, from

any attempt to meet competition. It was planned before any competition started, and they planned these losses, and these losses were in fact incurred, and particularly in the Intermountain Area, although they had a profitable frozen pie business in the windup, about 1961, in most other areas, and made a slight profit even this area during that period of time.

• • • • • • •

Now, in addition to the price in this market being a cut price at a loss, the evidence will prove that where they didn't have the independent competition of the Utah Pie Company, their prices were higher, on the same pie, of the same kind, the same quality, the same label, the same everything, their prices were higher in other areas than they were in the Salt Lake area. This is the price discrimination between purchasers who are buying the same goods. This price discrimination, which means only a price difference, the evidence will prove this price difference, this price difference had the low level price in the Salt Lake area. That involves Idaho, Montana, Wyoming, Washington, and Oregon. That's the area in which this little Salt Lake company traded. But the low leg of this price was in the Salt Lake trading area, and the high leg of this price was principally in the eastern United States and in California.

• • • • • • •

In the eastern zone, where there is apparently less competition, but not a lower cost of production, their prices as a matter of price lists were generally higher on the same product, of the same quality, to purchasers similarly located.

• • • • • • •

[fol. 55] Mr. Alioto: I was discussing before this *colloqui* the fact that the Utah Pie Company was not just generally in a target area; it was actually the target these folks were aiming at in connection with this undercutting in prices and below cost and its price differential.

I was about to say that about a month before Mr. Chapman became the broker in this area and the man who made the recommendations for the pricing procedures in this area for Continental—for Morton—a month before that he had a private conversation with young Mr. Gaylen Rigby here, who was the general sales manager and the only man in the organization that does any marketing; and in this private conversation he suggested that he wanted the Utah Pie account for this area and told them what a great account it was.

The Rigbys didn't give him the account, for reasons which will subsequently appear. So he got the Continental, the consolidated account—or, rather, before he got it, just before he got it, in the same conversation he told Rigby that "I'm going to get a national account, and I'm going to come in here, and I'm going to get you," the Utah Pie Company.

So he went out and got the Continental account, and he came back and immediately started, or continued, this type of local price cutting in the area based upon his recommendations where, which led to a deterioration of the price of the Utah Pie Company.

Now, that's so far as Continental is concerned.

• • • • • • •

Now, then, the evidence will show—and this we get down now to the second element in the case, which is impact, or injurious impact, upon the plaintiff in this action—the evidence will show that the plaintiff started packing his pies and selling them in this area at $4.15 a dozen, $4.15 a dozen. That is in September of 1957, when it first went into this business. Then it will show that as a result of this undercutting and this below-cost selling, and these price differentials, with the low leg of the price here in Salt Lake City, 750 miles from the plant, and the high leg of the price out in California, or in Iowa, or at eastern points, right where the plants are located, despite the fact you would think it would be the other way and, under the economics, would be the other way.

[fol. 56] The evidence will show that the results of this pricing pattern of these defendants produced a gradual, discernible erosion in the price that the Utah Pie was getting. That price went from $4.15, $4.30 in January of 1958, then it starts down gradually until just before we filed this lawsuit, that is, in August of 1961 the price had gone down, as a result of these practices, to $2.75, from 4.30 to 2.75.

We will prove these things conclusively to you from actual invoices and actual invoice studies made by the defendants, as a matter of fact, from the books and records of the Utah Pie Company.

And then after this lawsuit was filed, the price steadied just a little bit, and some of these practices were put under wraps for the moment.

Then, in terms of actual damage because of this price erosion resulting from these practices, the plaintiff was compelled to sell at depressed prices to keep his volume. And the family members just worked harder at the business in order to do this. They worked long hours. These folks, all of these Rigbys, get up here at six o'clock in the morning, and they work until about 4:30 or 5:00. And that is seven days a week, except on Sunday. On Sunday they get up at about 4:00 because they had their priesthood meetings at 8:00 in the morning. So that they worked from 4:00 in the morning until 8:00 in the morning, and attended their LDS services. That is the reason they start earlier on Sunday. But, by reason of this work, this hard work, they were able to maintain their volume and maintain some profits in the business even though the price had eroded from $4.30 down to $2.75.

And we expect to show that as a result of the erosion in this price they lost, during the period in question, approximately $250,000, just from the depressed price. In other words, we will show, as we pointed out earlier, when pies were selling here at this very low rate of 2.75, they were selling out in California, right next to the plant, for

$4.16. And if they had been able to charge that same price here— When I say "next to the plant," I mean the defendants were selling, Morton, selling right next to their plant in California at $4.16, when they had forced the price erosion down to 2.75 here.

Now, had they had that price applied to even their own volume, their damages during the four-year period would be approximately $250,000, or approximately $60,000 a year.

[fol. 57] In addition to that, we will present evidence that they lost substantial volume that they ought to have had on a fair competitive basis and that they lost this to this below-cost price cutting that took place, and that the amount of money they would have made from this volume at fair competitive prices, fair competitive market prices, was approximately $180,000.

And I think the evidence will prove to you that, in addition to these losses, the undercutting and the below-cost selling resulted in a certain diminution in the value of Utah Pie Company as a going concern. I think you folks engaged in little business will understand this feature of it. It resulted in the diminution of the value of that company because of these things that were going on. It was worth less as a going concern because of the erosion in the price structure, the loss of its volume, and the fact that it was trying to contend against these odds.

We will have estimates—and that is all we have to have on this phase of the case—estimates that that loss was approximately $75,000.

* * * * * * *

Mr. Alioto: Ladies and gentlemen, this is Plaintiff's Exhibit 4, Utah Pie Company I.B.M. listing of frozen pie sales by flavor. It's 8-inch pies only. On the first page it lists the flavor code. By looking at this number one, you know it's apple, number two is cherry, number three Boysenberry, and so forth. And then the other code number is the brand code. There's one, the Utah label; two, Boston Cream label; and so forth.

And then there is a customer code that indicates each customer who received the particular goods in question from 1957 down through 1962.

And finally, on this page we have the date, the invoice number, the brand, number one being apple in this case. It's the only one we're going to read for you. And then the number of dozens, the flavor—this is the apple flavor—number one being the brand name, number two—this second one—being the flavor. And the other columns have the gross price per dozen, the gross sale price, the discount, the net sale price, the net price per dozen, the advertising allowance, and the customer number on the end which identifies, with the key in the beginning of the book, the exact customer involved.

[fol. 58] I'm just going to read the pie prices for apple pie, frozen apple pies, of the Utah Pie Company, the plaintiff in this case, starting September of 1957. It starts out at $4.15, 4.15, 4.15, and goes to 4.66, in connection with a customer on November 4, *1947*. $4.15, $4.20, $4.15, $4.19, $4.40, $4.15, U-$4.65, $4.42, $4.65, $4.15, $4.42, $4.15, $4.15. Beginning in January of 1958, the price is $4.30 and continues that way for a number of days. Then on April of 1958, it goes to $4.00, $4.30, $4.15, $4.00, $4.15, $4.00, $4.15. And it stays at $4.00 or over for all of the period set out on this page, which is April of '58 to July of '58. Stays at $4.00 or over from July to October. It stays at $4.00 or over from November—rather, from October to January of '59. It stays at $4.00 from January of '59—$4.00 or over—January of '59. May, July, August. And it breaks below $4.00 on August 10 of 1959, $3.70, $3.70, $3.70. $4.00 price, $3.70, $3.70. Except for two prices on this page. Then below $4.00. At $3.70 most of the time. And $3.60 September of '59.

Three dollars for most of the period from September, 3.70; under $4.00 for most of the period from September, 1959 through October, '59; it is at 3.70 up until February of 1960; 3.70 up until March of 1960; and it breaks to $3.00 on March 18 of 1960; 3.70; $3.00; 3.60 prices to May of

1960; 3.70; 3.70; 3.50; 3.70; 3.60; 3.30 prices to June of 1960; and it is 3.60; 3.00; 3.00; 3.45, at about that level down to April of 1961; it is above the 3.00 level; 3.60 and 3.75 down to October of 1960; stays above the 3.00 level until November of 1960; January of 1961 it is at 3.60; February it breaks down to 3.10, in February of 1961; and goes back to 3.70, 3.60, and then stays at 3.10 for approximately—a number of sales—3.60; and finally breaks below the 3.00 point; below the 3.00 point in June of 1961; back to 3.10; 3.50; 3.60; and breaks down to 2.75 in June of 1961; stays at that 2.75 level until June 28 of 1961; after one 3.60 and 3.20 sale it goes back to the 2.75 level through June and July; stays at the 2.75 level; 2.75 level, down to August—

* * * * * * *

WILLIAM ROSS KITCHIN, called as an adverse witness by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Kitchin, would you be good enough to state your name, please, for the record.

A. Yes. William Ross Kitchin.

[fol. 59] Q. Where do you reside?

A. In White Plains, New York.

Q. What is your business or occupation?

A. I am a vice president in charge of production of Morton Frozen Foods Division of the Continental Baking Company.

Q. How long have you been a vice president of the defendant Continental Baking Company?

A. Since January 1.

Q. Of this year?

A. Of this year.

Q. Prior to that time what position did you hold, Mr. Kitchin?

A. Director of Production.

Q. How long had you been director of production of the Morton Frozen Foods Division?

A. Since 1955.

Mr. Alioto: On that basis, if your Honor please, we will apply to the Court for the right to examine this witness as an adverse witness and respectfully request that the Court instruct the jury as to what that means.

The Court: Well, the request is granted.

• • • • • • •

Q. Did you know in 1957 that there were negotiations between your company and Carnation for a co-packing arrangement?

A. We anticipate—or we get into many areas of considering suppliers, specifically, if this company was—we were engaged in negotiations then, I am not familiar, but this thing is going on continuously. It is a common thing, a well-known thing in our industry, to use co-packers. Many companies do it. The Armour Company does it, Frosty Acres do it, and so on. Many companies do this.

Q. Is it customary to use your competitors as co-packers?

A. Of course.

Q. It is?

A. Certainly, if you need a co-packer. Competitive.

• • • • • • •

Q. Now, Mr. Kitchin you have some responsibilities, or have had some responsibilities, on sales as well as production, haven't you?

A. Some limited, yes.

Q. Yes, and what period of time was that?

A. Well, in—let's see, February, 1961, to, I guess, last fall.

Q. February of 1961 till last fall?

A. Yes. That would be the fall of '62.

[fol. 60] Q. '62.

A. Yes.

Q. Would you be good enough to tell us the nature of the sales functions that you discharged in that period of time?

A. Well, my primary function in this company, as I described, is production, and we had been looking for years for some type of co-packing arrangement out here on the West Coast, and I had made many trips to the West Coast looking for a possibility. We worked out an arrangement with the Del Mar Food Products Company early in 1961, and I came out here with some of our people to get this operation going and work with the Del Mar group.

At times during this period, along with purchasing and along with working in a plant and getting an operation going, in making it efficient, I did some sales work, and this was work to familiarize myself with the market in some sales—in the sales business.

Q. And what market did you familiarize yourself with in the West, just California, or did it include Utah?

A. Yes, I have talked about Utah.

Q. Would it be correct to say that your sales activity, beginning in February of 1961, related to the Western Region generally?

A. Yes. In scope, I would say that is correct.

Q. Covering what states?

A. Washington, Oregon, California primarily.

• • • • • • •

Q. Crozet is Virginia?

A. Yes, that is correct.

Q. And what type of pies do you ship from Virginia to Salt Lake, or have you shipped from Virginia to Salt Lake, in the period from '58 to September of '61?

Mr. Schafer: Could I ask you, Mr. Alioto, are you talking about fruit pies or the entire Morton line of some 53 items?

Mr. Alioto: I am talking about pies.
Mr. Schafer: I don't understand the word "pies."

By Mr. Alioto:

Q. Do you know what "pies" means, Mr. Kitchin?
A. Yes. There are different types of pies.
Q. What kinds are there?

Mr. Schafer: I would like to know, Mr. Alioto, if we are talking about meat pies and pot pies, et cetera, I object upon the grounds of irrelevancy.

[fol. 61] By Mr. Alioto:

Q. Let me ask you, what kinds of pies have you shipped from your Virginia plant to the Salt Lake area?

A. I am not familiar with what pies, specifically, have been shipped from the Virginia plant to the Salt Lake City area. I know that Pies have been shipped from the Virginia plant of the Webster City, Iowa, plant to the Salt Lake City area.

Q. You say you do know the pies that were shipped from the Virginia plant?

A. Pies could have been shipped from either plant, yes.

Q. To the Salt Lake City area?

A. Yes.

Q. Would that include the fruit pies as well as the meat pies?

A. It could. I am not sure. It depends on our inventory situation.

Q. Now, Mr. Kitchin, wasn't there one period of time when you were shipping your pies from your Webster City, Iowa, plant out to the West Coast, and then from the West Coast back to Salt Lake City?

A. I think we did that for one very brief period of time. That, again, could be a matter of inventory adjustment. We have a hundred and some items that we have to look after across the country.

Q. Do you know for how long a period of time that was done?

A. No, not now.

Q. For the most part would it be true that your Salt Lake City pies are shipped from the West Coast?

A. Fruit pies—

Q. Yes.

A. Yes.

Q. And that's to Utah, to Idaho, to Montana, to Wyoming?

A. I think in Utah, Idaho, Wyoming. In most cases they come from Del Mar, yes. West Coast.

Q. Now, so far as your pricing methods are concerned, Mr. Kitchin, do you sell on a f.o.b. factory-plant basis, or—

A. We have at times.

Q. What is the method you have sold from 1957 down through September of 1961?

A. Well, I'm generally familiar with the sales program. In the first place, I got into this thing, as I told you, in the beginning of 1961, and got out of it in '62, the fall of '62. We usually sell on a delivered price basis.

Q. Have you sold on a delivered price basis for most of the period up to '61, September of '61?

A. September of '61?

Q. Yes.

A. We have sold—some cases we have sold f.o.b. plant cost. For the most part, to my recollection, we sell delivered prices.

Q. And you have delivered prices within certain geographic zones, I take it?

A. We have delivered prices in particular markets and zones, yes.

[fol. 62] Q. And those prices are the same in all sections of the zones?

A. It depends on the competitive situation.

Q. Well, I mean, as a matter of your list prices, on a matter of your price lists, don't you have uniform prices

within every area of the zone, no matter how far removed from the plant?

A. It depends on the market conditions at the given time, how competitive the situation is.

Q. You mean that you put out price lists which show different prices for different purchases in the same price zone, Mr. Kitchin?

A. No. No. To my knowledge, with my time of being in sales, we have a zone price, what is called a list price, a delivered price.

Q. Does that mean, if a plant, for example, is located in that zone, that the purchaser who lives right next to the plant pays the same price as the purchaser who may live 300 miles from the plant?

A. Not necessarily, no.

Q. Isn't that what a delivered price means, Mr. Kitchin?

A. That would be your list price, but it depends on the competitive situation.

Q. As a matter of issuing your price lists, your price lists show a uniform price within the entire zone, regardless of where the customer is located; isn't that correct?

A. Listwise.

Q. Let me show you a price list. Would you be good enough to look at it, sir, and state whether or not you recognize that price list?

A. This looks like one of our price lists, yes.

Mr. Alioto: We'll offer it into evidence, if your Honor please, as the plaintiff's exhibit next in order.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 8 for identification was received in evidence.)

Mr. Alioto: This price list, ladies and gentlemen, states it's a Morton price list; and at the top it states: "Price Advice, 32-W. Effective in States of California, Arizona, Washington, Oregon, Utah, Montana, Nevada, and Idaho."

By Mr. Alioto:

Q. Now, would you be good enough to look at this price list, the same date, September 4, 1961. Examine it, please, and then state whether or not that's a price list issued by your company.

A. This looks like one of our price lists.

[fol. 63] Mr. Alioto: We'll offer it into evidence as the plaintiff's exhibit next in order.

Mr. Schafer: No objection, your Honor.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 9 for identification was received in evidence.)

Mr. Alioto: This, ladies and gentlemen, is the same date, September 4, 1961. Price Advice No. 48. Effective in the territory east of the Rockies. And then lists a series of states, beginning from Alabama, down to Wyoming, and the District of Columbia.

By Mr. Alioto:

Q. Mr. Kitchin, did you only have two territories at this time east of the Rockies and west of the Rockies?

A. As I explained before, my part in sales is to work on the West Coast.

Q. Well, take the West Coast price list, then, Mr. Kitchin. Would you be good enough to tell us from that price list what was the price of apple in that western area? The truckload price.

A. The truckload, six 22-ounce apple, $2.00 a case.

Q. $2.00 a case?

A. Yes.

Q. Now, would you be good enough to look at this eastern price list for the same day and tell us what the price was on that same commodity at that same time? It's the apple pie, truckload price.

A. Yes. Per case?

Q. On the same basis as the other list you just read.

A. $1.82 and one-half cents.

Q. Would you show me where you were reading, please?

A. Right here. Truckload prices, 3,000 units, $1.82 and one-half cents.

Q. Where is your $1.82?

A. For the case. Case of six—

Q. It's a dollar how much?

A. This was a dozen. This is six.

Q. All right. Now, how do you translate this price? What is this price?

A. That's truckloads. Delivered price.

Q. What does $3.65 mean in that sense?

A. Per dozen.

Q. $3.65 per dozen?

A. Yes.

Q. All right. And this price is what? $2.00 for what figure? For what volume?

A. Apple, $2.00 per truckload price per case.

Q. Now, there would be how many cases in a dozen in this situation?

A. In this particular case here?

[fol. 64] Q. Yes.

A. Two.

Q. Two cases per dozen. Where do you see the "per dozen" statement?

A. Here (indicating).

Q. Cents per dozen. And where is your case statement?

(Witness indicates.)

Q. Now, from what plant is this western region served? Look at those dates and tell us, if you would, please, from what plant you served those two regions?

A. Fruit-plant-wise?

Q. Yes.

A. From the Del Mar Plant in Watsonville.

Q. All of the states there involved?

A. I'm not sure of some of the fringe states here; but California, Washington, Oregon, Utah possibly could be. I'm not sure of Montana and Nevada or Idaho.

Q. Now, would you be good enough to look at this Exhibit 9, please. Would you tell us from what plants you served those states so far as fruit pies are concerned?

A. From the Crozet, Virginia, plant, and Webster City, Iowa plant.

Q. How about Wyoming? Where do you serve that from?

A. I'm not sure of that. Some of that possibly could come from the Webster City plant to Iowa.

Q. Well then, do I understand that there would be parts of the Intermountain Area that would be served from the California plant and parts of the Intermountain Area that would be served from the western plant?

A. It could. It depends on inventories and situations at a particular time.

Q. And even from the Virginia plant?

A. It depends on where the product is produced at the particular time.

Q. Now, would it be correct to say that regardless of where the product comes from, the price is always the same, whether it's from Virginia or whether it's from California?

A. Depending on the competitive situation, that's the way we set our prices, in the given area at the time.

Q. Okay. Do you know a man named Stan Chapman?

A. I met him this morning.

Q. Did you know before that time who he was?

A. No, sir. I knew who he was, yes. I never met him.

Q. Did Mr. Chapman have some position with your company?

A. Mr. Chapman is our broker.

Q. For approximately how long has he been your broker?

A. I'm not sure of that. I think Mr. Chapman was appointed before I came out to the West Coast.

Q. All right. At the time that you were working in sales on the West Coast, did you have anything to do with Mr. Chapman?

A. No.

[fol. 65] Q. Did he ever confer with you in connection with sales?

A. No.

Q. Who was Mr. Chapman's immediate superior in connection with sales?

A. In our company, Dick Halverson.

Q. Mr. Kitchin, during the time that you were representing your company on the West Coast, were there any time —in sales, that is—when you were working in sales—were there any periods of time when the price in Salt Lake City was lower than the price you charged and received in California?

A. Anywhere in California?

Q. Yes.

A. In other words, do we have a cheaper price here than we had in California?

Q. Yes.

A. No.

Q. You mean at no time?

A. Not to my knowledge, no.

Q. Do you know whether or not Mr. Chapman was ever authorized to sell your product in this area at a higher price than you were receiving in California?

A. He could have been. I'm not sure of that. Mr. Halverson and Mr. Chapman—

Q. Well, when you were in California in that 1961 period, weren't you consulted about that?

A. Not—generally consulted about situations that came up that could be competitive.

Q. Let me ask you specifically. In June of 1961 did you have any conferences with Mr. Vail or your superiors

about lowering the price in Utah below the amount that you were receiving in California? Did you, sir?

A. Will you repeat the question?

(Question read.)

A. No. Not about lowering any price lower than we were receiving in California, because we had prices in Los Angeles of $2.85 per dozen.

Q. Mr. Kitchin, I show you an invoice. Is that one of your invoices?

A. Yes.

Q. Does that invoice correctly represent the facts it purports to set forth?

A. Well, I don't know if this invoice includes price discounts, advertising allowances, that type of thing. I'm not familiar with that.

Q. Do you know the Fox Markets in Los Angeles?

A. Yes.

Q. Let me show you an invoice dated July 6, 1961. Would you be good enough to look at that, please, and state whether or not it's an invoice of your company?

A. Yes. This looks like an invoice of our company.

Q. Will you compare the dates of these two invoices?

A. Yes.

Q. Are they at or about the same time?

A. Yes.

[fol. 66] Mr. Alioto: We'll offer these in evidence, if your Honor please, plaintiff's exhibit next in order.

(Plaintiff's Exhibit No. 10 was thereupon marked for identification.)

* * * * * * *

Mr. Schafer: May I ask him one question, your Honor? Mr. Kitchin, can you tell us whether or not this invoice, Plaintiff's Exhibit 10, reflects the actual net price paid by the customer on that sale?

The Witness: I don't believe it does.

By Mr. Alioto:

Q. Well, do you know whether it does or not, Mr. Kitchin?

A. No, because my recollection is a market with discounts at this time we were selling the apple pies much cheaper. I can't recall when we sold them at $4.00 a dozen.

Mr. Alioto: We'll offer it in evidence, if your Honor please.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 10-A for identification was received in evidence.)

Mr. Alioto: I'd like to call the jury's attention, your Honor, to this matter. The first one is Fox Markets in Los Angeles, July 7, 1961, 1800 dozens apple pie. It shows a gross of $4.00 and a net of $4.00, and a gross of $7,200. The second cancellation or credit dated July 6, 1961, is a credit memo on apple pie for 550 dozen, showing a gross price of $4.04, an allowance of $1.30. It's in Ogden, Utah. $1.30, and a net of $2.74, as against the other invoice net of $4.00.

By Mr. Alioto:

Q. Did you have anything to do with the Seattle area in this same period of time?

A. Yes, I had something to do with it. Not too much.

Q. Would you be good enough to examine that document and state whether or not it represents an invoice of your company and correctly states the facts that it purports to set forth?

A. This looks like an invoice of my company, yes.

Q. For the Seattle area?

A. Yes.

Mr. Alioto: We'll offer it in evidence, if your Honor please.

. . . . . .

[fol. 67] Mr. Alioto: This invoice dated July 26, the same date as the other one, 1961, shows apple pie at $4.16, gross price, with a 66 cent allowance, or $3.50 price, in Seattle, Washington.

By Mr. Alioto:

Q. Let me show you now an invoice of the American Food Stores in Ogden, Utah, dated the same date, July 6 of 1961. Will you examine it, please, and state whether or not that's a document or a photostat of a document of the Morton Company?

A. Yes. This looks like one of our invoices.

• • • • • • •

(The exhibit marked Plaintiff's Exhibit No. 12 for identification was received in evidence.)

Mr. Alioto: Twelve in evidence is a price in Ogden, called the Seattle price, the same date, July 6, 1961, 505 dozens of apple pie at $4.04, with a $1.45 allowance, or a net price of $2.59.

By Mr. Alioto:

Q. Now, Mr. Kitchin, would you be good enough to explain to us Exhibit 11 and 12, 12 being in Ogden, shows a net price of $2.59; that's correct, isn't it, on apple?

A. This doesn't say, "Delivered in Ogden, Utah"—I mean, in Ogden, Utah, yes.

Q. You mean that this is a f.o.b. California price?

A. I am not sure. It doesn't say on here. It refers to something else.

Q. Would you look at the Seattle—

A. It refers to another invoice.

Q. Would you be good enough to look at this Seattle invoice and look at that apple pie price, 4.16 minus 66, or 3.50 net, as against the 2.59 net. Would you say that those two prices are on a different basis and not on exactly the same basis? Is that what your testimony is?

A. My testimony is that in looking—in reading this invoice, it refers to another invoice. It doesn't say specifically if this is an f.o.b. plant price or a delivered Ogden, Utah price, and there is a great difference between the two.

Q. Do you think that on the same day you were using a delivered price system in one area and an f.o.b. system in another area, on exactly the same invoice day?

A. It could be possible, I am not sure.

[fol. 68] Q. Mr. Kitchin, the plain fact is you were charging two different prices on the same day for exactly the same commodity, isn't it?

A. In two different markets, one 1200 miles from our location and the other 550, and this one here looks like the f.o.b. plant price.

* * * * * * *

By Mr. Alioto:

Q. The date of both invoices is July 7, isn't it, 1961? Is that correct?

A. Yes, July 6.

Q. All right. And the Seattle price is what? Net price?

A. Three fifty.

Q. Three fifty?

A. Delivered to Seattle.

Q. And the Ogden price is what?

A. Two fifty-nine, I believe f.o.b. our plant, which is quite a difference.

Q. Two fifty-nine. And when you say you believe "f.o.b. your plant," what is the basis for saying that?

A. Because this price reflects an f.o.b. plant price.

Q. Mr. Kitchin, why don't you look at the allowances on that invoice.

A. I did look at them.

Q. Aren't those allowances different, and isn't that where the difference is?

A. The allowance—in one case there is an allowance of $1.45; in another there is 66 cents. It is purely on a competitive situation in a given market at the time.

Q. Then those are two different prices on exactly the same basis, aren't they?

A. No, not on the same basis.

Q. Would you concede with me now, Mr. Kitchin, that your testimony about maybe one was an f.o.b. price and the other one was a delivered price, that that is not correct?

A. No, sir.

Q. Doesn't the difference in price result from the difference in allowance? You cut off more in this market than you did in the Seattle market, isn't that quite clear?

A. The allowance could include a freight pickup f.o.b. the plant.

Q. Do you ordinarily put your freight allowances on an invoice in that manner?

A. It certainly could be done.

Q. Are you just speculating about that?

A. No, I am not speculating, but I know here that the $1.45—it could very well include a freight allowance. I am not speculating at all. I am trying to answer your question logically and honestly.

Q. Will you be good enough to take a look at this document—

A. There is no similarity between the two.

Q. Will you be good enough to take a look at this document that your counsel thought was redundant, that was the same as the other. How much of an allowance do you find on the document that was canceled? It is 1.30, isn't it?

A. Yes.

[fol. 69] Q. And on the corrected document it is 1.45, isn't it?

A. Yes.

Q. Now, isn't it perfectly clear from that now that freight isn't involved and these are both delivered prices?

A. There could have been a difference in freight. It could have been included in the allowance, that we were making a correction. That happens.

Q. Let me ask you this, Mr. Kitchin: Are these exactly the same kind of apple pies?

A. Yes.

Q. Manufactured in exactly the same place?

A. Yes.

Q. And they are goods of like quality?

A. Yes. But that has nothing to do with the price allowances, that is, ship an inferior product to Seattle—

Q. Will you be good enough to take a look at this invoice dated July 20, 1961, within a couple of weeks of that, Oakland, California.

A. Oakland, California, all right.

Q. Is that a document of the Morton Company?

A. Yes.

Mr. Alioto: We will offer it into evidence, if your Honor please, as plaintiff's exhibit next in order.

Mr. Schafer: No objection.

The Court: Received.

(Plaintiff's Exhibit No. 13 was thereupon marked for identification and received in evidence.)

The Witness: Do you want these?

Mr. Alioto: Yes, in just a moment.

May I point this out to the jury, if your Honor please?

The Court: Yes.

Mr. Alioto: This document to Oakland, California lists apple pie at 4.06, minus an allowance of 30 cents, or a net of 3.76.

By Mr. Alioto:

Q. How far is Oakland from your plant?

A. Well, I guess it is 90 to 100 miles.

Q. Now, the apple pie that is involved in this Oakland 3.76 price is exactly the same apple pie, isn't it, that is involved in this Ogden 2.59 price?

A. Yes.

[fol. 70] Q. Would you be good enough to look at the Oakland invoice and state whether or not that is on a delivered price basis or on f.o.b. plant basis?

A. It is f.o.b. warehouse. I take it it is a delivered basis.

Q. That is f.o.b. buyer's warehouse?

A. That is right.

Q. So that is a delivered price basis?

A. That is where you pay money from freight from the plant to get it up there, so it costs more.

Q. Where are you reading f.o.b. warehouse?

A. Right there (indicating).

Q. F.o.b. whose warehouse?

A. Select Union's Warehouse.

Q. In Oakland?

A. Yes.

Q. So an f.o.b. warehouse in Oakland is a delivered price in Oakland?

A. Yes, could be.

Q. Now, look at the same invoice for Ogden. Doesn't that also say f.o.b. warehouse, exactly the same?

A. No. It says "Warehouse 59." Shipped from Watsonville. I am not clear what that means, but I think there is an allowance in here for price for—this will have to be clarified, Mr. Alioto. There is an allowance there for freight f.o.b. plant pickup, which is quite a difference.

Q. Look at Exhibit 12, which is the same invoice. Is there any doubt that that says "f.o.b. warehouse"? That is the Ogden.

A. I know. Again it says "Warehouse 59," which I am not familiar with.

Q. I take it you would agree with me, Mr. Kitchin, that the same apple pie that you shipped from your plant in California to Oakland costs you less delivered in Oakland than that same pie shipped to Ogden?

A. Yes, it would cost you less.

Q. What would cost less?

A. It would cost you less to ship it to Oakland than to ship it to Ogden, but I think this f.o.b. plant price for the Ogden shipment, and a lot of the difference is in freight.

Q. Mr. Kitchin, you know what the freight is, don't you, between your plant in California and Ogden?

A. I'm not sure.

Q. It is 30 cents, isn't it?

A. I think it is 30 cents, yes.

Q. Haven't you testified that it was 30 cents?

A. Yes. I testified it was 30 cents.

Q. Then 30 cents doesn't account for that difference, does it?

A. No, that doesn't account for the difference. I said "in part." An allowance for freight could be allowed, which would mean an f.o.b. plant price.

[fol. 71] Q. When we admit that freight doesn't account for the difference, would you be good enough to tell us why you are charging less money in Ogden, Utah, than you are in Oakland, California, located in the same state where your plant is, on or about the same date.

A. That depends strictly on a competitive situation with the hopes of doing business at the time.

Q. Whose competition were you meeting in July of 1961 that you had to dip down to this 2.59 price in Ogden?

A. Probably Utah Pie Company.

Q. Mr. Kitchin, are you just speculating on this, or do you have any factual basis on which you are making that statement?

A. I'm not sure. I am not sure of the situation that occurred at the time that we set the price, because, as I explained to you before, I was involved with setting up the plant, gettings things going, buying materials, and running other plants across the country, and this entails a lot, and I want to answer you truthfully, and it is very difficult for me to give you specific answers to these questions you are asking me here now.

Q. In other words—

A. But I certainly am attempting to do so.

Q. In other words, Mr. Kitchin, somebody else was responsible for this price difference, is that it, not you?

A. As far as the price difference—

Q. Yes.

A. (Continuing)—I could have been in on the price change in Salt Lake City if it meant meeting the competitive situation and it meant moving merchandise, because we had a very difficult time moving merchandise in Ogden.

Q. Mr. Kitchin, would you be good enough to tell us whether or not you had any participation at all in setting these apparent price differentials as evidenced on these invoices, that is, 2.59 in Ogden and 3.76 in Oakland and 3.50 in Seattle, on or about the same time, for the same kind of pie? Did you have any responsibility at all for that?

A. No, I don't think so.

Q. That was somebody else's responsibility, is that it?

A. Yes.

Q. And who was that somebody?

A. Mr. Halvorsen.

Q. Mr. Vail?

A. Mr. Richard Halvorsen.

Q. Who is he?

A. He is our regional sales manager for the West Coast.

Q. Wasn't he under Mr. Vail?

A. Yes.

Q. Is Mr. Vail here in Salt Lake City at the present time?

A. Not to my knowledge.

Q. Where is he?

A. I don't know where Mr. Vail is.

[fol. 72] Mr. Alioto: We have no further questions.

Cross examination.

By Mr. Schafer:

Q. Mr. Kitchin, is it a part of Mr. Vail's responsibility to be intimately connected and concerned with the local competitive situations in the various hundred or so markets throughout the country?

A. No, sir. It would be impossible for any man to be familiar with local situations in every market throughout the country. Mr. Vail is a very busy man.

Q. You testified, I believe, on direct examination, Mr. Kitchin, that you think you may have had some participation during the short period of time when you were setting up this West Coast production facility with the pricing in the various Western markets, is that correct?

A. Yes, that's correct.

Q. And your function—could you describe for us, Mr. Kitchin, your function in that *roll*. What were you required to do?

A. Well, in the given markets, if I was questioned by Halvorsen about prices in competitive situations, I would discuss this with him and contact our people, usually in New York, after going over it with him.

Q. So you relied upon Mr. Halvorsen, your Western Regional Sales Manager—

A. Yes.

Q. (Continuing)—for your—

A. And our brokers out here.

Q. Please let me finish my question before you give me an answer.

Mr. Schafer: Did you get the question?

(Question read.)

Q. (Continuing)—for your information on competitive conditions in the various markets?

A. That is correct.

Q. And the person within the Morton organization charged with having knowledge of the competitive situation in Salt Lake City, as well as in Ogden, as well as in Seattle, and as well as in Oakland, would be Mr. Halvorsen?

A. Yes.

Q. And you relied upon Mr. Halvorsen for reports on what was going on and what was necessary in order to meet competitive prices?

A. Yes. As Regional Sales Manager, I certainly did.

Q. Is that why you can't tell Mr. Alioto the details of why a 2.89 price was required in Ogden in July of 1961?

A. Yes.

[fol. 73] Mr. Alioto: Two fifty-nine, isn't it?

Mr. Schafer: We will correct that.

By Mr. Schafer:

Q. Now, Mr. Kitchin, one of the charges in the complaint is that the three defendant corporations have conspired to set a lower price in Salt Lake City and a higher price elsewhere—and I am not quite clear where—and you were shown Exhibits 8 and 9 by Mr. Alioto. I will show them to you again. And Exhibit No. 8, Mr. Kitchin, shows a per-dozen price in Salt Lake City on apple pies of what, per dozen?

A. Full truck load?

Q. Full truck.

A. $2 per dozen.

Q. $2 per dozen or $2 per case?

A. Excuse me, $2 per case.

Q. $2 per case, which is what per dozen?

A. It would be $4 per dozen.

Q. And Plaintiff's Exhibit No. 9, which is a price list for the Eastern—for the states east of the Rockies, as it is so marked, that shows a per-dozen price on apple pies of what amount, truck load price?

A. Three sixty-five.

Q. So that Morton was offering, according to its list price, apple pies east of the Rockies of $3.65, and it was offering apple pies west of the Rockies, including the State of Utah, at $4?

A. Yes.

Q. According to Exhibits 8 and 9?

A. Yes.

Q. So that prices in Salt Lake City, Morton's prices in Salt Lake City, and in other Western States, just according

to those price lists, were 35 cents higher in Salt Lake City than they were in the Eastern States?

A. According to those price lists, yes.

Q. Now, I want to review with you, Mr. Kitchin, if I may, these exhibits that have been marked 10 to 13. No. 10, I will refresh your recollection, is an invoice recording a sale to a customer in the Los Angeles market?

A. Yes.

Q. You are aware—this is in July of 1961?

A. Yes.

Q. Do you recall, Mr. Kitchin, that starting in May of 1961 Morton was offering $1.15 advertising allowance on its sales of apple pies in the Los Angeles market?

A. That's correct.

Q. Now, would you explain to the Court, Mr. Kitchin, and to the jury what an advertising allowance is and how it is billed?

A. Well, an advertising allowance is usually—first of all, you have to obtain—you have to know that the stores, or your customers, have advertised. You make an arrangement with him that he will advertise for a consideration of [fol. 74] so much, usually per dozen. If he has proof of performance, proof of advertising, that he has done this, then you issue him a credit memo, which reduces the price of pies according to the arrangements you have made with him, and this all, of course, is meeting a competitive situation in the area. Normally, this is not carried on the face of our invoices. In this particular case here, in May of '61, we had an advertising allowance in Los Angeles, which covers Exhibit 10 here, and the net price sold in the market at the time would be $2.85 a dozen. In other words, it would be $1.15, from $4 to $2.85 a dozen, but we withhold the monies for this advertising, you understand, till we know they have advertised in the paper and pushed the product to sell. These things normally wouldn't count. So, in effect, your price, where it shows on the invoice at $4, later the allowance is given to the people and the net, net price be-

comes $2.85 in the market. And during this period we were 2.85 on apple pies in Los Angeles.

* * * * * * * *

By Mr. Schafer:

Q. So, Mr. Kitchin, your net price in Los Angeles of July 6, 1961 was what?

A. $2.85.

Q. On apple pies?

A. Right.

Q. Your net price in Seattle was 3.50, as far as Ex. 11 shows?

A. Yes.

Q. I may have that wrong. Yes, that is right, 11. Turning to Ex. 12, Mr. Kitchin, which shows the sale of American Food Stores in Ogden, Utah, and it shows a gross price of $4.04 on apple pies—is that correct?

A. Yes.

Q. Could you tell us what $4.04 is. Four dollars, as I understand it, was your published list price?

A. The published list price, yes.

Q. What is the four cents?

A. I'm not sure. Distributive price that was added on. I am not sure.

Q. Quantity discount price? In other words, do you get a $4 price whatever quantity you buy?

A. No. If you sell at less than truck load lot, then usually the price goes up. It could be less than truck load differential in price.

Q. I see. And the column headed "Allowances" shows $1.45, is that correct?

A. Yes.

Q. Do you recall, Mr. Kitchen, that at this time there was a $1.15 advertising allowance in the Salt Lake market, as there was in the Los Angeles market?

[fol. 75] The Court: Now, you are leading that witness, Mr. Schafer, and you have been leading him all along. This isn't cross-examination, you know.

A. I recall at the time that we had the same prices in Los Angeles that we had in Utah.

By Mr. Schafer:

Q. Can you account to us, Mr. Kitchin, for the freight count, albeit the allowance shown in that allowance column, or don't you know? If you don't know—

A. The reason I hesitated before: You have $1.45 here. There is 30 cents freight allowance and $1.15 advertising allowance. It comes out to $1.45. This thing on the sheet doesn't clearly say that that is what it is, but it certainly makes sense in our way of doing business.

Q. Is it your testimony that you don't know how the $1.45 breaks down?

A. I am not specifically sure how it breaks down, but we had an allowance of $1.15 at the time. It has been discussed here it is 30 cents for freight, I thing it is, f.o.b. pickup point price.

The Court: I should think three or four times ought to be enough to repeat that. And don't lead him again. He has just told you what he thinks it is.

By Mr. Schafer:

Q. Do you happen to know, Mr. Kitchin, what promotional allowances, or what you call off-invoice net prices, were available in the San Francisco market at this time, as reflected by Ex. 13, Plaintiff's Exhibit 13?

A. No. I am not familiar exactly.

Q. It shows a 30-cent allowance?

A. Thirty cents, yes.

Q. You don't know why it wasn't greater, is that your testimony?

A. My testimony is it is probably a competitive situation. We like to get as much as we can for our product in any particular market.

* * * * * * *

By Mr. Schafer:

Q. How many different prices would you have in the United States at any one time?

A. We could have an awful lot. It depends on the market condition at the time. We have to be competitive to do business to sell our pies. And certainly you can't sell them if you're 50 cents higher a dozen than a good competitor.

Q. In July of 1961 why didn't you charge everybody $3.50?

[fol. 76] A. Because in some highly competitive markets, like the Los Angeles market, which is known in our industry as being a tough competitive market, you certainly wouldn't sell very much at those prices. You might move pies in there, but they wouldn't sell.

• • • • • • •

By Mr. Schafer:

Q. You testified, Mr. Kitchin, that you had a function or a role in the setting up of a West Coast production facility for fruit pies; and I wonder if you'd explain for us, please, why you sought West Coast production for the production of fruit pies, and how long you had been doing so.

A. Well, it became quite obvious to us that we weren't competitive on the West Coast pricewise. And as I mentioned before, I made several trips, I guess eight out here over the years, and went up and down the West Coast to look for possibilities of where we could get a plant here, a co-pack arrangement in a good quality house and set something up that would make us competitive, so we could do business on the Coast.

I decided on the Watsonville area, because fruits are processed in the area. By that I mean they're taken from the trees, they're put in the crate, they're brought in town and into the plant, and they're peeled, and they're cored. And it seemed to me, that after discussing it with these people—and, by the way, they came to me and talked to

me a couple of times about it, first—that this would be a good arrangement, because, No. 1, they were in the apple processing business to begin with. They had a growing business. What we proposed to do is go on the West Coast where the fruit was and take advantage of processing. Instead of putting it in the tin can and freezing it in the tin can and use it later—and tin cans today cost you 40 cents a piece—it would be a savings of taking the meat, the apple meat or the apples, direct from the peelers and put them over into the pie.

Now, this to my knowledge had not been done on the West Coast. There are a lot of packers out here, a lot of fruit processors, but none of them were in the real center of the apple production area of Watsonville. And, frankly, I was a little surprised they were located farther afield than they were in the fruit pie business. So after making this study, realizing we had a going business, and as far as giving the cost and spreading overhead, this would be an additional or surplus business on top of the business that [fol. 77] already existed in this apple plant, we worked out an arrangement that we would put our production facility there. And I came out, brought some people with me to train the girls and train the men and get this operation going. And working with the human critter takes a lot of time and a lot of effort and a lot of patience.

* * * * * * *

By Mr. Schafer:

Q. Did producing fruit pies in Watsonville get you lower costs of production than you formerly had had?

A. Oh, it certainly did.

* * * * * * *

Q. And who were your competitors in the Western markets, Mr. Kitchin, on fruit pies?

A. On fruit pies?

Q. Yes.

A. The County Fair, Simple Simon, Pet, let's see. Oven Queen, Pantry Queen, Johnson. The Ward Baking Company—Johnson—Mary Elizabeth, Pie Boy, Swiss Miss; that would be a Pet second brand—and others, I'm not sure of all the rest of them.

• • • • • • •

By Mr. Schafer:

Q. Are you familiar, Mr. Kitchin, with the term, "prime costs"?

A. Yes.

Q. What does "prime costs" mean?

A. That's—they're the direct cost of doing business, your manufacture costs, your transportation cost, your brokerage cost. They're out of pocket money costs.

Q. If you sell a product, Mr. Kitchin, at a price above what you've just identified as prime cost, have you made money on the transactions?

A. Yes.

Mr. Alioto: I submit, if your Honor please, that that's a legal interpretation.

The Court: Yes, it is. I think so. Objection sustained.

By Mr. Schafer:

Q. Mr. Kitchin, does Morton think that when it sells a product at a figure above what you've identified as prime costs, that Morton is better off having sold that product?

Mr. Alioto: Objected to on the ground that—

The Witness: Of course.

[fol. 78] The Court: Wait a minute.

Mr. Alioto: Opinion and conclusion of the witness. And furthermore, that no proper foundation has been laid for the fact that this witness knows anything about that, and ultimately involves a legal interpretation of what is cost under 2(a) of the Clayton Act, and whether you can say that

cost is just direct cost without apportioning any overhead to it.

The Court: The objection is sustained, and the answer of the witness which came in before the objection is stricken from the record, and the jury is instructed to disregard it.

• • • • • • • • •

By Mr. Schafer:

Q. I show you, Mr. Kitchin, Morton's Exhibit 6 for identification and ask whether you can identify that document?

A. Yes, I can.

Q. Would you tell us what that document is?

A. This is a telegram from Dick Halverson, our regional—

Q. Don't tell us what the substance of it is. Just tell us what it is.

A. It is a telegram from me to Dick Halverson regarding the competitive situation of the Utah Pie Company on 24-ounce pumpkin pie.

Q. There are some penciled notations, Mr. Kitchin, on that.

A. Mr. Halverson—

Q. Please wait until I finish asking the question, so the reporter can get it clear.

A. Mr. Halverson requested in this telegram—

Q. Please don't tell us what the substance of it is. It has not been admitted in evidence. Just tell us whether or not those handwritten notations on the document are your handwritten notations.

A. Yes.

Mr. Schafer: I offer Morton's Exhibit 6.

Mr. Alioto: We object to it, if your Honor please, on the ground it's an interoffice communication between one of their employees, who presumably is available, and this witness on the stand on some report they received from a

third party in Utah, who is also connected with them. There is no evidence that the plaintiff ever received this or could be bound whatever is contained there. It seems to be elementary that that's objectionable.

[fol. 79] Mr. Schafer: Your Honor, it's written by one employee of Continental, to another employer of Continental. I can't put both of them on the stand at the same time. This man received this document in the ordinary course of business.

The Court: It sounds to me as though you're offering double hearsay in that thing.

Mr. Schafer: I'm offering it, if I may state it, I'm offering it for the purpose of showing the truth of the handwritten statement that Mr. Kitchin has testified he wrote.

Mr. Alioto: The document, anything he writes to himself somewhere, is not admissible evidence under any circumstances.

Mr. Schafer: On its face it is not written to himself.

The Court: Well, you have Mr. Kitchin—is that your name?

The Witness: I-n, Judge.

The Court: How do you spell it?

The Witness: (Spelling) K-i-t-c-h-i-n.

The Court: Mr. Kitchin is here on the witness stand under oath, available for cross-examination. Now, if he has some knowledge on the subject of the penciled notes, you may examine him on them, and Mr. Alioto may cross-examine him. But to offer a document here of something he wrote to himself down in the office, a penciled note on a document that goes to three people—two people—the trouble is that it is hearsay, it is not under oath, it is not subject to cross-examination. You have the man here. If he has any knowledge on that subject, ask him about it, but this is an odd way to get Mr. Kitchin's testimony in, by showing that he wrote himself a note down at the office.

Mr. Schafer: Your Honor hasn't had an opportunity to see the note, but it is not written to himself. On its face

it shows it is not written to himself. It is written in the ordinary course of business.

The Court: It is written to another employee in the company.

[fol. 80] Mr. Schafer: That is right, in the ordinary course of business.

The Court: It doesn't make any difference whether it is written to himself.

Mr. Schafer: Your Honor, I should state—I should make myself clear.

The Court: I have a little difficulty reading Mr. Kitchin's writing. I don't know what he is saying there, and it wouldn't make any difference what he is saying.

Mr. Schafer: I should make the statement, your Honor, that I am offering to show Mr. Kitchin's state of mind at the time he wrote the document, not for the truth of it, just for his state of mind, and a hearsay objection doesn't lie.

Mr. Alioto: You still can't prove a man's state of mind by offering an internal document that the plaintiff doesn't know about, never has received, has no knowledge of. It seems to me it is elementary that that is not admissible in evidence.

Mr. Schafer: Your Honor, if we can't admit any documents in this record that the plaintiff hasn't seen, we are just not going to have any documents.

The Court: That isn't the point. This is hearsay.

Mr. Schafer: This is not offered for the truth, your Honor. This is offered for Mr. Kitchin's state of mind when he wrote the document.

The Court: Well, it is offered for the truth of what he wrote on that document.

Mr. Schafer: He is here to be cross-examined as to did he write that and is it his handwriting, but it is not offered for anything as to the truth of what is in there. And he can be cross-examined. If Mr. Alioto thinks he didn't write it, he can cross-examine him.

The Court: The objection is sustained.

[fol. 81] By Mr. Schafer:

Q. Without referring, Mr. Kitchin, to the substance of the document, can you tell us whether or not that document refreshes your recollection as to the incident involved? Just tell us yes or no.

A. Yes.

Q. Can you tell the Court and jury what this incident which Morton's Exhibit 6—what this incident reflects?

Mr. Alioto: I think we ought to have a question and answer so that we can make a proper record. He is asking for some kind of a narrative statement.

The Court: Yes. I am not going to have any narrative statements now.

By Mr. Schafer:

Q. Mr. Kitchin, do you recall having received from Mr. Halvorsen a report as to the competitive activity of the Utah Pie Company? Just answer me yes or no.

A. Yes.

Q. Do you recall what that report received by you from Mr. Halvorsen said?

A. It asked—

The Court: There we go again, you see. You are asking him to tell you what somebody's report said. That document is not in evidence.

Mr. Schafer: Again, your Honor, it is not offered for the truth of what the report says.

The Court: You cannot examine this man on what some document said that isn't in evidence.

By Mr. Schafer:

Q. Do you recall, Mr. Kitchin, that you were asked by Mr. Halvorsen for a lower price to meet a competitive activity of the Utah Pie Company?

Mr. Alioto: If your Honor please, that is leading and suggestive and relates to a conversation that is obvious hearsay as to this plaintiff.

The Court: Sustained.

By Mr. Schafer:

Q. You have testified you recall the incident, Mr. Kitchin, that Morton's Exhibit 6—

A. Yes, I do.

Q. Do you recall whether or not you acceded to the request of the Morton salesman, Mr. Halvorsen?

[fol. 82] A. Yes, I recall. I did not give the reduced price that he asked for to be competitive at the time.

Q. Why didn't you give a reduced price to be competitive?

A. Because, as I say in that report, I thought the difference in our quality was worth the difference in the two prices between the two companies.

Q. Do you recall what flavor product was involved in that incident?

A. This was pumpkin pies.

Mr. Schafer: No further questions.

Redirect examination.

By Mr. Alioto:

Q. Mr. Kitchin, on your direct examination by your attorney you asked about an offering you made to Safeway. It appears that the price you offered Safeway in May of 1961 was $1.55 per case on apple. Is that correct? The price; I am not talking about costs.

A. Yes, f.o.b. the plant.

Q. F.o.b. what plant?

A. Watsonville plant.

Q. That is $1.55 per case?

A. May I look at it again?

Q. It is pretty hard to read, I admit, but would you look at it closely so we can be absolutely sure of that.

A. Case of sixes.

Q. Yes. That would mean, I take it, that that would be $3.10 a dozen.

A. Yes.

Q. And what was the nature of the pie you were proposing to pack for Safeway in this offer?

A. The nature of the pie?

Q. Yes.

A. An apple pie.

Q. Was it any different than the regular apple pie made by Morton?

A. Yes, it would have to be a different formula, because their formula is different.

Q. Was it a more expensive pie to pack than the one you made regularly?

A. I believe this is of a confidential nature really, even the prices we talked there.

* * * * * * *

[fol. 84] By Mr. Alioto:

Q. Mr. Kitchin, I was interrogating you at the recess about the difference between this apple pie that you offered Safeway and the apple pie you generally sold in the Intermountain area.

A. You want to know if there was a difference?

Q. Yes.

A. There is a difference?

Q. Yes.

A. We make a lot of formulas of a lot of companies. A lot of formulas we make to sell different companies. I am not familiar at this time whether it was the exact formula to ours or not. It is impossible, with 156 items, to keep up with all these details.

Q. Then you are telling me you don't know whether or not there was a difference between the apple pie you offered Safeway at $1.55 and the apple pie you were selling in Salt Lake City at or about the same time? Is that what your answer is, you don't know?

A. To be specific and honest, I am not sure. That is my answer, it is correct.

Q. You say you are not sure. Do you mean you have no knowledge about that at all?

A. I am not sure if the quotations in this letter are based on the same formulas that we use in our regular Morton pie, if that is your question. I am not sure.

Q. Then I want to be sure I understand it. There is not that much difference between the pie that you can say that the formulas are different, is that correct?

Mr. Schafer: He just said, your Honor, he didn't know.

The Court: Well, this is cross-examination, Mr. Schafer.

Mr. Schafer: The trouble—

The Court: Well, I don't think the witness has very clearly said he doesn't know. He says he is not sure. I [fol. 85] would like for him to tell me whether he knows or whether he doesn't know. If he knows, let him tell us what he knows. If he doesn't know, let him say so. If he says he doesn't know, why, that is an end of the matter, as you are suggesting.

A. I do not know if this is the same formula.

By Mr. Alioto:

Q. Well, as between the pies you make, how much of a variation in cost could there be predicated upon formula?

A. There could be a lot of variation in cost.

Q. How much?

A. There could be several pennies.

Q. Several pennies?

A. Of course.

Q. Now, you recall—

A. And nickels, and there could be dimes involved per dozen. It depends on the grade, the quality, the type of lard, the flour, and many things in making a decent pie.

Q. Don't you know, as you sit there, that the pie you were offering Safeway doesn't cost you 10 cents more to make

than the pie you sell in Salt Lake City in competition with this plaintiff? Don't you know that as you sit there?

A. It could very well cost you more if it is a different formula and a better grade. It could cost you less if it is the other way.

Q. Mr. Kitchin, you made this offer to Safeway, didn't you?

A. Yes.

Q. You knew what kind of a pie you were offering them, didn't you?

A. Yes, good quality pie.

Q. You knew what kind of a pie you were offering in Salt Lake City at the same time, didn't you?

A. Yes.

Q. Well, how much difference was there between those two pies, if any?

A. As far as the amount of ingredients in ounces and in pounds in the specifications, for me to tell you they are the same right here and now, I do not know.

Q. Isn't it a fact that the very same time you were offering Safeway a $3.10 price for an apple pie, where your competition was Pet, that you were offering your apple pie in Salt Lake City for about 50 cents less?

A. One *think* you have to—

Q. Is that true or false? First answer yes and then say anything you want, sir.

A. I am not sure of that either. I haven't looked at it and examined it. But that is a 24-ounce pie, and we are selling in Salt Lake City a 22-ounce pie, so naturally there would be a difference.

Q. Of 50 cents?

A. Well, it is two ounces times 24 ounces, makes a difference.

[fol. 86] Q. Mr. Kitchin, as director of production, I am asking you whether or not the difference between 22 ounces and 24 ounces is 50 cents?

A. No, it is not as much as 50 cents.

Q. Of course, it is not.

Mr. Alioto: We will offer at this time, if your Honor please, a document marked Plaintiff's Exhibit 15, from the deposition of Mr. Chapman, who was broker for this company, which purports to be an offer to Safeway in Salt Lake City at or about this same time.

Mr. Schafer: No objection, your Honor.

The Court: Received in evidence.

(Document marked Plaintiff's Exhibit No. 15 for identification was received in evidence.)

Mr. Alioto: This document on a Safeway form is an offer by Stan Chapman—

By Mr. Alioto:

Q. Incidentally, Mr. Chapman was your broker, was he not, in June of 1960—June of 1961, rather?

A. Yes.

Mr. Alioto: The offer reads as follows: "Minimum shipment 2400—"

By Mr. Alioto:

Q. Would that be dozens or cases?

A. "Minimum Shipment 2400—" dozens—no, they are cases, case packs, 2400 case packs of sixes.

Q. 2400 cases?

A. Of sixes.

Mr. Alioto: "Quantity available unlimited. Supplier's name: Morton Frozen Food, 1790 Industrial Way, Redwood City, California. Laid in cost per dozen Salt Lake $2.85 can be picked up in Watsonville, California at 30 cents less, or $2.55 a dozen net cost f.o.b. Watsonville."

By Mr. Alioto:

Q. Now, then, Mr. Kitchin, we have in your Safeway offer in June of 1961 an offer of $2.55 picked up at the Watsonville plant, and in your letter of May 22, 1961 you

offer Safeway a 24-ounce apple pie at $3.10 per dozen picked up at the plant. Is that correct?

A. Different weight pies—

Q. Is that correct, first of all?

A. Yes, as far as you said, yes.

[fol. 87] Q. Now, then, would you tell us whether or not, in your opinion as the production manager of the Morton Pie Company, the difference in the weight of those two pies can account for that differential in price between $3.10 in San Francisco against Pet and $2.55 in San Francisco for delivery in Utah where the Utah Pie Company is operating?

A. You have to take in the difference in weight and the difference in formula.

Q. Mr. Kitchin, would you be good enough to answer the question as to whether or not the difference in the weight and the difference in formula amount to the difference between $3.10 and $2.55. Here is a $3.10 price in San Francisco to Safeway, and if Safeway picks it up for sale in Salt Lake, $2.55. It looks like a difference of 55 cents. This one is a 24-ounce pie, is that correct?

A. That's correct.

Q. And this one is a 22 ounce pie?

A. That's correct.

Q. Would you be good enough to state whether or not the difference in weight between those two ounces—let's start with that—does the difference in weight between two ounces equal 55 cents?

A. No, it doesn't. That is as far as that goes.

Q. Let's isolate the formula alone. Does the difference in formula equal 55 cents?

A. It certainly could. It could be more or less.

Q. Could. What is your answer? Don't you have any answer as to whether or not it is equal to 55 cents?

Mr. Schafer: I object, your Honor. It was an answer. It was the best answer the witness could give.

The Court: It is a speculation.

The Witness: And you have other things involved here, too.

The Court: He says it might, it could, it is possible, but it is not an answer.

By Mr. Alioto:

Q. Now let's stay to difference now with this formula first, and then we will get to anything else you want to say to me, and I don't care how long you take to say it. Would you be good enough to tell me what is the difference in formula between the pie you were offering Safeway in Salt Lake City, where the Utah Pie Company operated; and the pie you were offering in San Francisco where you were competing against Pet.

[fol. 88] Mr. Schafer: Your Honor, in response to your own questioning the witness flatly said he didn't know what the difference in formula was.

The Court: Yes. He said he didn't know the formula, and I think that is answer to the question, and that is an end to that.

Mr. Alioto: One other question that is different on that.

By Mr. Alioto:

Q. Where is this difference in formula available to us so that we can determine whether or not it adds up to 55 cents?

A. Where is it? We have a formula based on these prices in our files.

Q. I take it you can get this difference in formula back to us in this courtroom tomorrow morning if you use a telephone, couldn't you?

A. I don't know if we could have it back tomorrow morning or not, but we certainly could try to bring it here.

Q. Well, you can get it over the telephone.

A. Again, we are business people, and I have to object that some of these things are confidential.

The Court: Well, we will take care of that, Mr. Kitchin, when that situation shall arise.

The Witness: Not only that—

The Court: That isn't the situation now, and I don't want you to argue with counsel about it.

The Witness: Yes.

By Mr. Alioto:

Q. Let me ask you—

The Court: When we find out what it is counsel wants, the Court will make an order about that requiring you folks to produce it here in the courtroom. There is a trial going on. This is the United States District Court. And I know the problems of business men may seem important to you, and indeed they are important, but if it is necessary to have that information in this trial, the Court will order it produced. If there is any claim of a protective order, the necessity of a protective order, because you have some secret processes you want to protect from your competitors, we will look into that when that situation shall arise.

You may continue.

[fol. 89] By Mr. Alioto:

Q. Now, Mr. Kitchin, do you even have an opinion, in the light of all of the experience you have had in this industry, as to whether or not—an opinion, not knowledge, now—an opinion as to whether or not the Safeway formula can possibly account for a difference of 55 cents between the pies you offer Safeway in San Francisco and the pies you offer them for distribution here in Salt Lake City where the plaintiff operates?

A. I have no opinion.

Mr. Alioto: We would respectfully apply to the Court for an order, a minute order, to the witness to produce the Safeway formulas—and perhaps we can work it out with counsel to respect any confidence that is necessary—to

determine the question of whether or not there was any real difference between these two apple pies that were offered at or about the same time.

The Court: Do you know what it is that is required of you here? Should I make an order?

The Witness: No, we will produce this for you.

The Court: Well, I want to make an order about that. Will you prepare a written order for the file?

Mr. Alioto: All right, your Honor.

The Court: Being specific about what it is you want the witness to produce. And I will sign it. And fix a time on it, because we don't want to hold the trial up.

By Mr. Alioto:

Q. Now, then, with respect to this Safeway offer, I take it there was some communication between you and Mr. Chapman prior to the time that this $2.55 price was offered to Safeway here in Salt Lake City.

A. There was no conversation between me and Mr. Chapman.

Q. Was Mr. Chapman authorized to make that offer to the Safeway Company?

A. Yes. By our Regional Sales Manager, Dick Halvorsen.

Q. Were you consulted about it at all?

A. I could have possibly been consulted about it.

Q. Didn't you have something to do with sales at or about that time, 1961?

A. Yes, I did. Yes, I did.

Q. You know, do you not, that a sale was in fact made?

A. Yes.

[fol. 90] Q. You sold 15,000 cases to Safeway in Salt Lake City under that price, didn't you?

A. I am not familiar with the amount, but it is possible.

Q. Over 10,000?

A. It could be.

Q. And Safeway picked up some of those cases right at the plant in Watsonville for $2.55, didn't it?

A. Yes.

Q. Isn't it a fact that on that very same day that Safeway picked up those apple pies for $2.55 any purchaser who lived right next to your plant would have had to pay $4 for the same pies?

A. No, I don't think that is a fact at all.

Q. Well, what is the fact?

A. I think you have to take into allowances off the list and go to the record and find out what the costs to buyers next to the plant were at that time.

Q. Isn't it a fact that this $2.55 had nothing to do with advertising performance or anything else, but was a straight price cut?

A. I am not sure of that. I think this made allowance for billback, advertising allowance billback.

Q. If the fact turns out to be that it didn't make any allowances for advertising, or that no advertising was necessary, then it would be a straight price cut, wouldn't it?

A. It could be. I am not familiar with this situation.

Q. Now, if you had, in fact, in California a $4 price with a $1.15 advertising allowance, that would not be a price cut, would it?

A. That is a price reduction for performance of advertising.

Q. Let's put it down here.

A. Excuse me.

Q. Take a $4 price in California. Now, if you had a $1.15 advertising allowance at this time, making a net of $2.85, if that were the situation, do you believe that your advertising is some kind of a fictitious thing that you don't get any value out of?

A. If you paid out $1.15 for proof of performance of advertising, and it is hard money, you do it with a dire hope of getting a lot of value out of it.

Q. So it is not a price cut at all, is it?

A. It is for featuring the product, performance of featuring the product. It is a reduction in price to $2.85.

Q. There is actually no difference so far as price is concerned, if you took that $1.15 and paid it to an advertising agency, is there?

A. Of course there is a difference.

Q. Well, you mean that you don't get any value out of that $1.15?

A. I didn't say that at all. You asked me was there a difference. There is a big difference. No. 1 is the chain is the one that features it. It is much better to have a chain do it than any advertising agency, in my opinion.

[fol. 91] Q. But, in any event, you received something for the $1.15?

A. Yes, you did, advertising.

Q. So that the price is actually $4.00, and you received something back for which you in effect paid your purchaser? Isn't that the actual situation?

A. Yes.

Q. If on the other hand the Safeway price turns out to be $2.55 price without any necessity for advertising, if that happens to be the fact, then the comparison has to be made, does it not, between the $2.55 price and the $4.00 price, if that happens to be the fact?

A. If they make the—state that again.

Q. If Safeway under this $2.55 price was not required to give you any proof of advertising and was not required to advertise at all, if that turns out to be the fact, then the comparison should be made, should it not, between this $2.55 price and the $4.00 price, if that turns out to be the fact?

A. Well, if the situation was that it was an allowance of $1.15 for proof of advertising, and they didn't advertise —and these things aren't handled until after you have proof of advertising—that would be a fact.

Q. Now, then, let me ask my question again. Assume that it can be proved with the next witness that the $2.55 price didn't involve any advertising at all, that it was a straight price cut without proof of advertising, if that were true, in

determining prices, wouldn't we have to compare $2.55 to the $4.00, if that were true?

A. I'm not sure you're going to find that out.

Q. But if that were true, wouldn't this be the fact? Assume for the moment it's true.

A. I'm not familiar with the situation. I don't know whether it is true or not.

Q. But if it were true, wouldn't this be the comparison, $2.55 and $4.00?

A. If you sell a product, a dozen for $4.00, and you sell the same product at $2.55, it would be true. But we have to get the facts and understand the situation.

Q. All right. Now, let's get the facts. I'll show you a document heretofore marked Plaintiff's Exhibit 16 for identification which purports to be a price list of Morton Company in the western areas. And you'll notice that that truckload price per case on apple pie is $2.00. Is that correct? Per case?

A. Yes. Per case—

Q. That would make it $4.00 per dozen?

A. That's correct.

Q. That's correct, is it not? Now, let's look at the supplements to that advertising. Here's a supplement in southern California dated July 3, 1961, and you will note that the effective date of the thing I am about to call your attention to is May 29, 1960. That's correct, is it not?

A. Yes, that's correct.

[fol. 92] Q. Now, you'll notice there's an allowance, an advertising allowance, of 70 cents per case; is that correct?

A. Yes.

Q. Billed back with proof of advertising?

A. That's correct.

Q. That's in California; is that correct?

A. That's correct.

Q. Now, let's turn to the supplement that relates to Utah. On this exhibit, see the supplement that relates to Utah? Idaho, Utah, and western Montana?

A. Uh-huh.

Q. You see that reduction of $1.15 under "temporary discount per dozen"?

A. I do.

Q. Does it say anything about advertising?

A. No. It says, "temporary price discount".

Q. All right.

A. There's nothing wrong with that. In the course of doing business—

The Court: Now, Mr. Kitchin, your attorneys are quite capable of taking care of the situation. You don't have to make an argument—

The Witness: Excuse me.

The Court: —to the Court every time he asks you a question.

By Mr. Alioto:

Q. Now, this price cut, this $1.15 price cut, didn't involve any advertising at all in Utah, did it, under your own list?

A. No, it didn't.

Q. All right.

A. Not a temporary price discount, no. To meet a competitive situation.

Q. All right. Now then, if it is true that Safeway didn't have to advertise, wouldn't the direct comparison of prices be between that $2.55 and the $4.00?

A. On a temporary basis, to be competitive it looks like it would be.

Mr. Alioto: All right. We'll offer this in evidence, if your Honor please, Plaintiff's Exhibit 16.

Mr. Schafer: May I see it?

Mr. Alioto: Surely. The effective date is July 3, 1961.

Mr. Schafer: I thought you said 1960.

[fol. 93] Mr. Alioto: The date I called to Mr. Kitchin's attention was May 29, 1960, the effective date of the 70 cents billback with proof of advertising.

Mr. Schafer: Perhaps I misunderstood you. I just want to make sure that the record was right. I have no objection to that document. It will have to be supplemented, because it doesn't fully report the prices in Los Angeles.

Mr. Alioto: But do you have the Los Angeles supplement right there, so there will be no question about it?

Mr. Schafer: No, I do not have it. Mr. Bertain and Mr. Caldwell have agreed that we have the prices accurately stated, but this doesn't do it.

Mr. Alioto: Well, when we have the supplement—and if you can give it to me, we'll put it in right now.

Mr. Schafer: I don't have it with me.

Mr. Alioto: All right. We'll offer it.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 16 for identification was received in evidence.)

By Mr. Alioto:

Q. Now then, not only Safeway got this price cut without any necessity to prove advertising or do any advertising, but all of the buyers in the Salt Lake area who generally purchased from the Utah Pie Company got the some deal in or about June of 1961, didn't they?

A. I certainly hope they would.

Q. What is the answer? Yes or no.

A. Yes.

Q. All right.

Mr. Schafer: I didn't understand the question, sir. It was that they all got the same deal offered, or that they all—

The Court: Read the question.

The Reporter: I missed a few words on that, your Honor. It's on the recorder.

[fol. 94] The Court: It's a good thing you had that.

By Mr. Alioto:

Q. I'll ask it again. Is it not a fact, Mr. Kitchin, that the other buyers in this area in or about June of 1961 were

offered the same price cut as Safeway was offered, without the necessity of having to do any advertising?

A. Yes.

Q. Whereas the buyers in San Francisco could only get their—or, in California—could only get their allowance if they gave proof of advertising, at the same time?

A. Yes, as far as these documents show.

Q. All right. Now then, there are only about three or four buyers in the Salt Lake area who account for about 90 per cent of the business, aren't there?

A. I'm not familiar with the Salt Lake area. This is the first time I've been to Salt Lake. We have a regional sales manager that handles Salt Lake, and I'm primarily a production man.

Q. Why don't you come out more often? It's a very delightful city, Mr. Kitchin.

A. Thank you. I appreciate it.

Q. Now then, I show you a document previously marked Plaintiff's Exhibit 14 for identification, which purports to set forth a series of Morton invoices, July 21 of 1961, July 28 of 1961, July 26 of 1961, and June 29 of 1961. You would agree, would you not, that these invoices are original invoices prepared by the Morton Company and sent to the customers designated thereon?

A. Yes.

Mr. Alioto: We'll offer these in evidence, if your Honor please.

Mr. Schafer: May I see it?

Mr. Alioto: We'll offer these in evidence, if your Honor please.

• • • • • • •

(The exhibit marked Plaintiff's Exhibit No. 14 for identification was received in evidence.)

Mr. Alioto: I want to read this to the jury. Grocers Wholesale, Salt Lake City, Associated Food Stores, Pocatello, Idaho, Associated Food Stores, Salt Lake City, Safe-

way Stores, Salt Lake City. And these show the Grocers Wholesale on July of 1961 got the $2.55 price for apple, the $2.85 price for coconut pie. Associated Food Stores in Pocatello, Idaho, received a $2.89 price for apple, in [fol. 95] July 21, of 1961. Associated Food Stores in Salt Lake City, a $2.55 price for apple in—and for coconut pie, rather, in July 26, 1961, and Safeway a $2.85 price for coconut pie in June 29 of 1961.

By Mr. Alioto:

Q. Now, all of these invoices reflect under, "Allowances," the figure $1.45, $1.15, and other figures. You will agree with respect to the apple pie that those allowances did not in July of 1961 involve any advertising at all, won't you?

A. Based on just what we talked about.

Q. Yes. Based on your own price list which I've shown you.

A. Yes. As far as this account, yes.

Q. Now, everywhere else in California, or at the same time, any allowance was predicated upon advertising, wasn't it?

A. I'm not familiar with that. It could be, and it couldn't be. It just depends on what's the competitive situation at the time.

Q. Mr. Kitchin, your $2.55 price to Safeway was below your cost, wasn't it?

A. $2.55?

Q. Yes.

A. No, sir.

Q. You weren't manufacturing the apple pies that you sold to Safeway under that order yourself, were you?

A. We were manufacturing the pies that we sold to Safeway at the Watsonville plant.

Q. Yes. Now, the Watsonville plant is not owned by you, is it?

A. No, it isn't owned by us.

Q. It's owned by some third party?

A. That's correct.

Q. And he makes pies for you, and he invoices you on those pies, doesn't he?

A. That's correct.

Q. And those invoices represent the very lowest cost you could have on those pies, obviously, don't they?

A. At the particular time. It represents a billing, the cost per dozens that they billed to us.

Q. You don't supply the ingredients?

A. No, sir.

Q. He supplies the ingredients and everything?

A. Packaging and the whole shooting match.

Q. You do supply them, I take it, with the formula?

A. Yes.

Q. Would you be good enough to look at this document, folder of invoices, which your counsel has given us in the discovery proceedings in this case, and state whether or not those documents represent the invoices against which you pay for the apple pies that you sold to Safeway under this contract?

A. All right. What was the date of the Safeway contract, to be specific?

[fol. 96] Q. The Safeway offer—

A. Offer.

Q. The Safeway offer was in June 16 of 1961, and deliveries—well, we'll get to that later. These don't show deliveries. The assumption would be, I take it, that the deliveries occurred in June and July and August, wouldn't it, on 10,000 cases? Would that be correct, Mr. Kitchin.

A. We used to sell 10,000 cases through one branch in one week end. I'm not familiar with the situation.

Q. All right. Do these invoices correctly represent what you paid this third party for the pies that were then picked up by Safeway?

A. Yes.

Mr. Alioto: We'll offer this, if your Honor please.

Mr. Schafer: Have no objection, your Honor.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 17 for identification was received in evidence.)

* * * * * * *

By Mr. Alioto:

Q. Now, this money that you pay this packer in Watsonville for making these pies that you deliver to Safeway, that's not your only cost on those pies, is it?

A. That's the total manufactured cost.

Q. You have selling expenses against that, don't you?

A. We have some, yes.

Q. Well, you pay Mr. Chapman, for example, three per cent?

A. Yes. We have brokers expense.

Q. Now, in addition to that you have other selling expense against those pies, don't you?

A. Yes.

[fol. 97] Q. Would you please be good enough to designate all of the elements of expense you have against—

A. I'm not familiar with all of the elements of expense we have and the total cost system in our company. When it becomes a situation to be competitive in a market, and it means whether you make a sale or you don't make a sale, then we would rather, in my business judgment, make a sale at cost, slightly below for a limited period of time, to keep ourselves in position in the market, with the hopes that the price situation will rectify itself, that at a later date we can increase our prices.

Q. And you did in fact then sell below cost in connection with the sales in June and July in Salt Lake City, didn't you?

A. Mr. Alioto, I did not say we sold below cost.

Q. As far as your policy was concerned, it was part of your policy that you would sell below cost if that's what you deemed necessary?

A. In my business judgment, at times when you have to meet competition, for a limited period of time, a slight amount below cost to keep a plant operating is justifiable in any business.

Q. Did you offer below cost when you were competing for the Safeway account with Pet?

A. We certainly did not.

Q. I take it you can't even give us an estimate as to what additional costs you would have over your invoice costs?

A. I'm not an accountant, Mr. Alioto.

Q. Incidentally, so that we may have that contract before us—how long have you been packing your pies in Watsonville?

A. In Watsonville? Since February, I believe it's February 1, 1961.

Q. Well, let me show you a document which your counsel has handed me.

A. All right.

Q. Which purports to be a letter contract between the Del Mar Foods Company. Would you first of all identify that company?

A. The Del Mar Foods Company is the plant that we've been discussing that's in Watsonville, California, that packs Morton Fruit pies.

Q. And is that the contract, with slight modifications perhaps, under which you have been operating?

A. Yes, with some modifications, this is the contract. This is dated November 21, 1960. The supplement to this changed it when we went into production, the contract would commence, which was in February 1, 1961.

Q. Okay. So that all of the pies that you sold in Salt Lake City, the apple pies that you sold in Salt Lake City, in the period we're speaking of—that is; June, July, and [fol. 98] August, September, of 1961—came from this plant?

A. I would imagine so. I'm not sure of that. I mentioned before that we have 70-some warehouses, a hundred and some products, and sometimes products could come

from different areas. In this particular case I think it came from the Watsonville plant.

Mr. Alioto: Offer that in evidence.

By Mr. Alioto:

Q. How about coconut pies that were sold under these orders? What plant did they come from?

A. What time was that, Mr. Alioto?

Q. In July of 1961.

A. July of 1961? They could have come from our Webster City plant.

Q. They could not have come, could they, from your Watsonville plant?

A. No, I don't believe we were in production in coconut pies at the time in Watsonville.

Q. So if anyone bought coconut pies for Salt Lake City in July of 1961 and picked them up at your plant in Watsonville, those pies would have made the journey from Webster City, Iowa, to Watsonville, and then from Watsonville back to Salt Lake City, wouldn't they?

A. That could have been so, yes.

Q. Let's look at this specific order here for the Grocers Wholesale and for your Associated Food Stores, one in Pocatello, Idaho and the other in Salt Lake City. By looking at your invoices, isn't that clear, that they came from Watsonville, and by reference to the $2.55 prices in the clear, that it was picked up at Watsonville by the buyer?

A. Yes. The coconut pies on this invoice were picked up in Watsonville.

Q. And they had to come from Webster City, Iowa?

A. They could have come from Webster City, Iowa. In all probability they did. The coconut pie is a very inexpensive pie to make. We operate our own truck fleet at an inexpensive cost. We were supplying the West Coast. In the normal event of supplying all over the country to the many warehouses, they could have come out of the Watsonville plant.

Q. Well, where else could that coconut pie have been manufactured by you?

A. By our company where we have a process that manufactures coconut pies?

Q. Yes.

A. In Crozet, Virginia.

Q. So it could have come only from Iowa or Virginia, before it got to Watsonville, prior to being sent to Salt Lake?

A. Yes, it had to come from where it was manufactured.

[fol. 99] Mr. Alioto: We'll offer 18, if your Honor please, into evidence, being the packing contract between Morton Frozen Foods Division of the Continental Baking Company and the Del Mar Foods Company, dated November 21, 1960.

The Court: Any objection?

Mr. Schafer: I don't know what the relevancy and materiality of it is, your Honor.

Mr. Alioto: Well, for one thing, it shows exactly that they did, for example, this company—it didn't buy the food and give it to this packer. It would tend to prove that whatever was on the invoice was the price they paid. Are you worried about some confidential relationship here?

Mr. Schafer: I am.

Mr. Alioto: Well, you can seal this in an envelope as far as we're concerned.

Mr. Schafer: I don't know what the relevance is.

The Court: He just stated it.

Mr. Alioto: We'll submit it. The contract under which these people packed pies in California that are sold here in Salt Lake City in a cost suit I submit is relevant on its face.

Mr. Schafer: I object, your Honor. I haven't had the opportunity to look at it yet, but it has nothing to do with cost.

The Court: It's received in evidence, and you look at it all the time you want to, and if there's anything you want to talk to me about, you bring it to my attention on a motion to strike.

(The exhibit marked Plaintiff's Exhibit No. 18 for identification was received in evidence.)

• • • • • • •

[fol. 100] By Mr. Alioto:

Q. Mr. Kitchin, I call your attention to the revision of your price list, 31W, dated July 3, 1961, which relates to this area. You will note, do you not, that this $1.15 price cut, without any necessity for advertising, covers the area of Idaho, Utah, and western Montana. That's correct, isn't it?

A. Temporary price discount.

Q. Well, does it or doesn't it cover just this area?

A. Yes. A temporary price discount that covers that area.

Q. Now, why did you select Idaho, Utah, western Montana, just that area, for this special treatment?

A. Well, I don't think we selected it for any special treatment. It was a situation that from my knowledge, and I'm not sure that I was in on this thing when it happened at the time, that we wanted to be in a competitive situation with the Utah Pie Company and to stay here and do business in this market and be competitive. So we made a temporary price reduction to be competitive.

Q. Then can we conclude that whatever the reason or background, that this was directly aimed at the Utah Pie Company—or other—this price reduction?

A. I have stated—

Q. Of $1.15?

A. I have stated I'm not clear on the situation of who the competition was at the particular time, but it was Utah Pie Company or some other company, the minute—whether we do business in this market or lose our position in the

market—and they had a competitive situation that required us to drop our price—accordingly here we would have to do it, rather than be pushed out of the market.

Q. Is your answer that you don't know whether this was aimed at Utah Pie Company specifically, this selecting only Idaho, Utah, and western Montana?

A. I think I answered that. I said I'm not familiar specifically with it, whether it was the Utah Pie Company or other companies or several companies.

Q. Well, were you in connection with making this price cut of $1.15 trying to preserve an old customer that you had, or were you trying to get new business?

[fol. 101] A. We were trying—in all probability, trying to maintain our position in the market. And if we can get new business, of course we would get new business.

Q. In other words, you expected to get new business with this $1.15 price cut, didn't you?

A. Mr. Alioto, I'm not familiar with the situation when it happened at the time. I'm in production. I spend most of my time in production.

Mr. Alioto: We have no further questions of this witness.

Recross examination.

By Mr. Schafer:

* * * * * * *

Q. As an expert in production, Mr. Kitchin, do you have a general opinion that you operate on as to what the difference in cost of producing a 24-ounce pie versus a 22-ounce pie is?

A. The difference is two ounces per pie, 24 ounces a dozen, which could amount to anywhere between 25 cents and 35 cents per dozen.

The Court: I thought this was the very question Mr. Alioto asked and the witness said he didn't know. And, not only didn't know, but didn't have an opinion.

Mr. Schafer: No. He said he didn't know the difference in the formula, not the difference in the cost of producing the different size pies.

Mr. Alioto: He said he did not have an opinion as to difference in cost. I tried every way to get him to tell me whether there was a cost difference in the 55 cents. I thought I did. But as long as he has answered, we will cross-examine him further on it.

• • • • • • •

By Mr. Schafer:

Q. Was it contemplated, Mr. Kitchin, that the 3.10 price would be over a period of time?

A. Yes.

Q. That was not on a— Was that on a spot basis?

A. In a particular arrangement of this nature it would be foolish for any chain or any other corporation to enter into a contract for a limited period of time. When they asked you to pack their pies, you work out such an arrangement.

• • • • • • •

[fol. 102] Q. All right. Referring Mr. Kitchin, if I may, to Plaintiff's Exhibit 17, which has been offered in evidence, and referring in particular to Invoice No. 128, which is dated June 8, 1961, can you tell us what price that shows you bought frozen apple pies at from your packer, the Parkway—is that Parkway Foods or Del Mar?

A. It is Del Mar. Parkway and Del Mar are the same thing.

Q. Same thing.

A. The cost per dozen of apple pies at this time was $2.46 per dozen.

Q. $2.46?

A. Yes.

Q. And I think the testimony was that in July of 1961 you offered those pies, apple pies, for sale, which you produced in Watsonville, at 2.55, am I correct?

A. That's correct.

Q. On an f.o.b. plant basis in Watsonville?

A. That's right, right at the door of the plant.

Q. And you testified, I understand you to say—you testified that your direct selling costs comprehend production, freight, and your brokerage expense in the Salt Lake City market?

A. That is correct.

Q. You didn't have—did you have any freight, sir, any freight cost to you—

A. No freight.

Q. (Continuing) —when you sold on an f.o.b. Watsonville basis?

A. No.

Q. So that if we add the brokerage to the $2.46, we come out with total direct cost to Morton of that sale?

A. Yes, that is correct, total direct cost.

Q. And your brokerage expenses in Salt Lake City were what?

A. Three per cent.

Q. Three per cent. We take 3 per cent of the selling price and we get the brokerage?

A. Yes.

Q. That you had to pay, that Morton had to pay?

A. Yes.

Q. And that comes out to what, seven and a half cents, is that right?

A. Yes.

Q. We add seven and a half cents to your cost of production and you get your total direct costs, $2.53½, is that correct?

A. That's correct.

Q. So that you made one and a half cents on every dozen you were able to sell?

Mr. Alioto: That is objected to on the ground that when you have direct costs without having selling costs and overhead, it is a legal conclusion he is talking about. If he

gets 2 cents over direct cost, all right, or one and one-half cents.

[fol. 103] Mr. Schafer: That's right, that is all I mean to say. The question should have been: Did you get one and a half cents over your direct cost when you made that sale?

A. Yes.

* * * * * * *

By Mr. Schafer:

Q. Does that mean, Mr. Kitchin, that every sale, every dozen, every dozen that Morton was able to sell at 2.55, that Morton had a cent and a half profit that it would not have otherwise had?

A. That is correct.

The Court: I don't understand that: Wouldn't otherwise have had.

Mr. Schafer: Well, the question—

The Court: Wouldn't otherwise what?

Mr. Schafer: I think the witness understood me, your Honor. If he hadn't made the sale—

The Court: I am sure you and the witness understand each other, but I don't understand it.

By Mr. Schafer:

Q. If you had not made that sale, Mr. Kitchin, would you have had any additional money in the Morton till?

A. No, we would not.

The Court: You mean, if you make a sale, you make one and a half cents over direct costs?

Mr. Schafer: That is right.

The Court: Is that all you are saying?

Mr. Schafer: That is what I am asking the witness, if he comes out one and a half cents better off if he makes the sale.

The Court: If he makes the sale.

Mr. Schafer: Yes.

[fol. 104] The Court: I think I understand that.

Mr. Schafer: Is that all right?

The Court: Yes.

By Mr. Schafer:

Q. So for every sale you made at 2.55 you made one and a half cents. And I don't know how many sales you made, Mr. Kitchin. There was talk about 10,000 cases.

A. Yes.

Q. That would be 5,000 dozens, right?

A. Right.

Q. And you multiply 5,000 dozens by a cent and a half. Let's see if I can do it right. It is getting kind of low down.

Mr. Alioto: $75, isn't it?

Mr. Schafer: Right.

By Mr. Schafer:

Q. So that if you were able to sell 5,000 dozens, you made $75 on the deal?

A. Yes.

The Court: Above direct cost.

Mr. Schafer: Above direct cost. He made $75 on the deal.

The Court: There are a lot of other things maybe. All you said you were asking about was what they made above direct costs. Now to say that they made a cent and a half on the deal is changing the witness' testimony.

Mr. Schafer: I think, your Honor, he said that he came out a cent and a half better off if he made the sale.

The Court: Above direct costs.

Mr. Schafer: Yes. But if he had not made any sale at all he wouldn't have gotten any money; having made the sale, he got $75.

The Court: Mr. Schafer—

Mr. Schafer: I think that is what his testimony is.

The Court: That is above direct costs.

[fol. 105] Mr. Schafer: That is right.

The Court: Now, if he had selling expenses, he didn't make a cent and a half.

Mr. Schafer: All of his direct selling expenses are computed in there, your Honor.

Mr. Alioto: His advertising?

Mr. Schafer: His direct selling expenses.

* * * * * * *

Q. First of all, Mr. Kitchin, with respect to the calculation that you and your counsel—that your counsel made with the help of your testimony just before the recess, you would agree with me, would you, that if you sold every pie you had in the place at 2.55, you would go bankrupt?

Mr. Schafer: Your Honor, I would like to object to that question on the grounds of irrelevancy.

Mr. Alioto: He tried to show they were making a lot of money on these pies, and I think he will agree with the statement I just made.

The Court: Overruled.

A. This sale is above direct costs. We certainly don't sell every pie that we make at these prices.

By Mr. Alioto:

Q. My statement is correct, is it not, that if you sold all of your pies at direct cost you would go bankrupt?

A. If we sold the apple pies at this cost, it would certainly not help the financial situation of the company.

Q. You would be operating at a loss, wouldn't you?

A. We would be operating at a profit over direct costs.

Q. When you are operating at a profit over direct costs, it is possible, is it not, that you are operating at a loss?

A. The way you phrase it, in total cost, yes.

Q. Of course. Now, did you have any other financial involvement with this packer in Watsonville?

A. No.

Q. He went broke, didn't he?

A. The Del Mar Food Company did not go—well, they went broke; they did not go bankrupt.

• • • • • • •

[fol. 106] Q. If these pies were invoiced on June 8, 1961, are they the ones that Safeway bought?

A. They could be, Mr. Alioto.

Q. You would hold them for approximately two months?

A. You could hold them a week or you could hold them two weeks; it depends on what the business was.

Q. Do you have any notion as to whether or not the Safeway order, which apparently was signed after June 19, was serviced from some other production at a higher cost?

A. No, I don't have it, no. I think that figure shows during the second period that our costs were $2.46 per dozen on apple pies. The invoice of a product made is one thing. The change of cost is another.

Q. I look at this invoice, for example, on August 11, 1961. Safeway took some pies during that period, didn't it?

[fol. 107] A. I am not familiar if they did or not.

Q. In any event, that cost is higher, isn't it?

A. Yes. It is a couple of pennies higher, that is correct.

Q. 2.4861?

A. Yes.

Q. Isn't it apparent, if you applied the brokerage against that, just the brokerage alone, you would come up with a figure of over 2.55?

Mr. Schafer: Your Honor, there is no showing that any such pie was ever sold at 2.55.

Mr. Alioto: No showing that any of these were sold either. This is more probable in August.

Mr. Schafer: Not in August. The sale was in July. He has already testified, and it is agreed, your Honor.

• • • • • • •

Further recross examination.

By Mr. Schafer:

Q. Mr. Kitchin, the complaint in this action alleges in Paragraph 8(a) that the defendants, including the Morton Company, have cut their prices on sales in the State of Utah below their cost of production and cost of distribution. Now, my question to you is whether or not those sales made f.o.b. Watsonville, California, $2.55 were below the costs of production and the costs of distribution?

A. They were not.

* * * * * * *

Further redirect examination.

By Mr. Alioto:

Q. Just one last thing on this matter of costs. Are you telling us that with direct costs of $2.535, even accepting those figures, that with direct costs only of $2.535 and a sales price of $2.55, that this is not below your cost of doing business?

Mr. Schafer: That wasn't the question, your Honor.

Mr. Alioto: I thought it was.

Mr. Schafer: No. The question was whether or not in the language of the complaint, Morton Company had sold at that price below the cost of its production and the cost of its distribution. I copied the language of your complaint.

[fol. 108] By Mr. Alioto:

Q. When you have production and distribution, that's cost of doing business. What else is there?

Mr. Schafer: No.

Mr. Alioto: What else is there?

Mr. Schafer: I have stated my objection. I don't want to argue it.

By Mr. Alioto:

Q. So the record will be clear on this, are you testifying that a price of $2.55, in the light of direct costs alone of $2.535, that this price is above your cost of doing business, including production and distribution?

A. This is below our direct cost of doing business.

Q. Okay. Then you meant direct costs?

The Court: Is there any answer to that? Did you answer that?

The Witness: You see—

The Court: I'm not asking you that.

By Mr. Alioto:

Q. In other words, when you answered counsel's questions, you meant below direct costs, and you didn't include—

A. No, it's above direct costs of doing business.

Q. All right. Then it's above direct costs only?

A. Yes.

Q. But it is below your full cost of doing business, isn't it, as reflected on your books?

A. Total company cost.

Q. Yes.

A. Yes.

* * * * * * *

Mr. Alioto: At this time, if your Honor please, the plaintiff will call as an adverse witness again, Mr. Stan Chapman.

Mr. Schafer: Your Honor, I certainly have to object to the calling of Mr. Chapman as an adverse witness. Mr. Chapman is not employed by the Continental Baking Company. Under the rule, of course, Mr. Alioto is permitted to

call as an adverse witness an officer, director, or managing agent of a defendant corporation; and Mr. Chapman is neither an officer, director, or managing agent, or even an employee of the Continental Baking Company.

• • • • • • •

[fol. 109] STANLEY EDWARD CHAPMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Alioto:

Q. Would you be good enough to state your name?
A. Stanley Edward Chapman.
Q. Where do you reside?
A. 7325 Crest Lane, Salt Lake City.
Q. By whom are you employed?
A. I'm self employed. I'm an independent businessman.
Q. And what is the name of your company?
A. Frozen Food Marketers.
Q. Is your company or *or* you—excuse me. Is Frozen Food Marketers—
A. Marketers.
Q. Is that a corporation, or a sole proprietorship, or a partnership?
A. Sole proprietorship.
Q. Now, you are and have been since September 26, 1960, have you not, you have been the exclusive broker for the Morton Pie Company in this area?
A. That is correct.
Q. And the area covers the States of Utah, Idaho, Montana, and northern Nevada?
A. That's correct.
Q. Is that correct?
A. Right.

Q. I show you a copy of a letter addressed to you from Mr. George A. Nightingale of the Morton Frozen Foods Division of the Continental Baking Company and ask you if that's a letter which you received on or about the date it bears.

A. Yes.

Mr. Alioto: We'll offer this in evidence, if your Honor please.

Mr. Schafer: Mr. Alioto, may we have a stipulation which I believe was agreed to that—

The Court: If you're asking for a stipulation, get your voice up, so the reporter can get it, and so I can hear.

Mr. Schafer: I'm sorry. I repeat myself. This letter, your Honor, states that Mr. Chapman is confirmed effective September 26, 1960. The letter is dated November 22, 1960, two months after September 26. Mr. Chapman in fact was not appointed, I think the record will show, until October 26, 1960. In other words, there's an error of a month in the letter. I understood from the deposition of Mr. Chapman that Mr. Alioto took that he agreed that that was an error, and I asked Mr. Alioto whether he would stipulate to that at this time.

[fol. 110] Mr. Alioto: No. It may not be an error. That's what we'd like to develop. It may have some significance in this matter.

The Court: All right. All right.

Mr. Alioto: This is offered in evidence.

Mr. Schafer: No objection.

The Court: It's received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 19 for identification was received in evidence.)

Mr. Alioto: Exhibit 19, dated November 22, 1960, reads as follows: "Attention Mr. Stanley E. Chapman, Frozen Food Marketers, Murray, Utah. Gentlemen: We have just been advised and confirm that on the effective date shown here, September 26, 1960, you became the Morton broker for the States of Utah, Idaho, Montana, and the northern

Nevada, known as Morton's Region 8, District 3. This is a big area, in which there is substantial potential. So we look forward to some real business for Morton. The Morton line offers all of the big volume convenience items in one package, backed by constant national advertising and promotion. The broker's commission is three per cent of your net sales on Morton branded products. Cordially, George A. Nightingale. Copies to George Vail and others."

By Mr. Alioto:

Q. Now, Mr. Chapman, you remember a luncheon meeting with Mr. Gaylen Rigby at the Crossroads in Salt Lake City?

A. Yes, sir.

Q. Did you call that luncheon meeting?

A. Yes, sir, I did.

Q. And was that luncheon meeting approximately one month before you became a broker for Continental Baking Company of Morton Foods Division?

A. I can't set the exact time.

Q. It was approximately a month before, wasn't it?

A. I would say.

Q. And at that time you were employed by Associated Grocers, were you not?

A. That's correct.

Q. And would you be good enough to tell the Court and jury the nature of the Associated Grocers?

A. It's a cooperative.

Q. It's a buying cooperative?

A. It's a buying cooperative. It has retail stores. Each of them own a share of stock, and they pool their resources together so that they can have the best buying power. Each member has a share of stock.

[fol. 111] Q. And what was the nature of your employment with that buying cooperative?

A. I was the frozen food buyer.

Q. For how long prior to that time had you been frozen food buyer?

A. Seven years.

Q. You were the principal frozen food buyer, were you not?

A. I was the Salt Lake buyer.

Q. Yes. And in that capacity you bought frozen pies?

A. That is correct.

Q. And you dealt with the various manufacturers of frozen pies, including Utah Pie Company?

A. That is correct.

Q. Did you arrange this meeting at the Crossroads restaurant with Mr. Rigby by telephone in advance? Is that the way it was done?

A. Yes, sir.

Q. And when you went to that lunch you proposed to him, didn't you, that you should become the broker in this area for the Utah Pie Company?

Mr. Schafer: Now, Mr. Alioto, your Honor, is leading the witness; and I have the objection that under Rule 43(b) he's not entitled to lead this witness. I have stated the grounds for it, and I won't state them again.

Mr. Alioto: The broker of the company, whether as an adverse witness or a hostile witness, it seems to me we're entitled to cross-examine.

Mr. Schafer: He's not either an officer, director, or managing agent, your Honor. He's not even an employee. And he certainly is not of the category, the high category of employee that's required under Rule 43(b) to be examined only as a hostile witness.

Mr. Alioto: It seems to me the broker for the competitor in this litigation, the sales representative for the competitor in this area, is hostile.

Mr. Schafer: He's not been demonstrated to be hostile, your Honor. He's not in that category of an employee. He's not even an employee.

The Court: Well, let's go along.

Mr. Schafer: That question is being withdrawn, is it not, the question I had the objection to as leading?

[fol. 112] The Court: The objection is overruled on that.

(Question read.)

The Witness: I talked to him regarding becoming his broker. That is correct. And I did that because I had heard that he was looking for a retail salesman.

By Mr. Alioto:

Q. And he told you at that time that he didn't think there was any brokerage in his arrangements that could be paid to you, didn't he?

Mr. Schafer: Your Honor, I don't know what you want me to do. I still have the same objection, of course.

The Court: You don't need to pay any attention to what I want you to do. This is your lawsuit, and you do whatever you want to about it. If you want to make an objection to these leading questions as they are asked, you go ahead and do it; and if I think they're objectionable, I'll rule in that direction. If I think they are not, I won't.

Mr. Schafer: Well, your Honor, I will have to object to every leading question asked of Mr. Chapman.

The Court: Well, you just do whatever you want to do.

Mr. Schafer: Well, I object again.

The Court: I want an opportunity to rule on them as they're asked.

Mr. Schafer: My position, your Honor will appreciate, is that no leading question may be asked of this man, since he is not an employee of the company.

The Court: Well, the trial judge has a very wide discretion with respect to whether he will or will not permit leading questions to be asked, quite apart from Rule 43 and quite apart from the rule with respect to a hostile witness. Now, one of the things that influences that discretion is moving the trial along. Another one that influences it is whether it's very prejudicial to you.

[fol. 113] Now, that's the position I take at this juncture; and until we find out we have any trouble getting any an-

swers to the questions, it may be that he will qualify under one of the other rules. I have a very wide discretion with respect to asking leading questions.

Mr. Schafer: I certainly don't want to get up and stop this trial every time there's a leading question asked. Can it be understood I have a continuing objection to leading questions? Is that the way you want to handle it?

The Court: No, no. Of course not. No, you just do as you please about it, Mr. Schafer; and the Court will consider your objections as you make them. Go ahead, Mr. Alioto.

By Mr. Alioto:

Q. Didn't you tell Mr. Rigby at that time that you were interested in his Frost 'N' Flame label?

A. Yes.

Q. Now, what was his Frost 'N' Flame label? Will you please tell the Court and jury?

A. The Frost 'N' Flame label was an exclusive label or private label handled only by Associated Food Stores.

Q. And you had made the deal with the Rigbys, hadn't you, in connection with that sale of the Frost 'N' Flame label to the Associated Food Stores?

A. Yes, I did.

Q. Didn't Mr. Rigby tell you at that time that they simply sold to Associated at a certain markup for profit and there was no money in it for brokerage?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Schafer: Now, your Honor, again the objection to the leading question. And secondly, your Honor will recall that before the trial started I told your Honor that this was going to come up in the trial and that we did have objections as to relevancy and materiality of this whole line of questioning. And, as I understood your Honor, at that time you said that you would like to hear a discussion of

that out of the hearing of the jury; and I wonder whether you would like to proceed with that now.

The Court: Yes. Ladies and gentlemen, will you step out of the jury room. Don't talk about the case.

(Here the jury was excused from the courtroom.)

The Court: You may proceed.

[fol. 114] Mr. Alioto: Now, to begin with, if your Honor please, the evidence in the deposition already shows that Mr. Chapman discussed this conversation with the Rigbys, with Mr. Halvorsen of the Morton Company at the time he made his contract to become Morton's broker. The time situation involved here, he states it was approximately one month before he became the Morton broker. That they met at the Crossroads. And then he had a meeting with Gaylen Rigby, his father and uncle, at the plant approximately two weeks later. Then shortly after that, there was a telephone conversation in which the witness claims he was told he would be the broker. Then shortly after that there was another telephone conversation in which the witness claims that he was told he would not be the broker, and at this time that he told them in substance or effect that he was going to go out and get another pie account and he was going to get the Rigbys.

Now, this is the same gentleman who made the Safeway deal that we talked about just a moment ago. Of course, it's our position, and I think we can support it, that the Safeway deal was the deal that was made on a predatory pricing basis, the same gentleman that caused the trouble from hereon in.

Now, it seems to me under those circumstances that this is relevant to what we are speaking of. This is the man that made the deals for them. One of the questions in this thing, while we don't have to go this far, is to prove that the Utah Pie Company was the actual target, not something in the target area, the actual target. The man who made this deal told them on this occasion that he was

going to go out and get a pie contract and get them, specifically. Under the circumstances, I don't know what could be more relevant.

Mr. Schafer: Well, the question, your Honor, is whether or not the statement was made by somebody who could bind Continental legally to the statement as a matter of legal substantive effect.

Mr. Alioto: I'm not trying to bind Continental. I'm trying to show the motive of the man who offered Safeway this predatory deal.

Mr. Schafer: Well, your Honor, if Mr. Chapman was a defendant, that would be relevant, but Mr. Chapman is not a defendant.

Mr. Alioto: He could be a co-conspirator.

[fol. 115] Mr. Schafer: He is not a co-conspirator. He is not alleged to be a co-conspirator. Mr. Chapman has nothing whatever to do with this Lawsuit. And this statement was made apparently at least two weeks prior to any connection with Morton, and that Morton was never informed of the statement at all, and there is no relevancy to what Mr. Chapman's intent was, whatever it was. What we're litigating is an alleged predatory attempt on the part of the Morton Company.

Now, there's no question but that Morton is chargeable with the price to Safeway, if that's an unlawful price. There's no question about that at all. We don't have to worry about whether or not Mr. Chapman made the Safeway deal. That doesn't make any difference at all. Morton made the Safeway deal. There's no question about that. What's alleged here and what this is being offered for is to prove that Mr. Chapman made some threat to the Rigbys and that that is binding against Morton. It's the only reason it could have any relevancy.

Mr. Alioto: I'm not trying to bind Morton.

Mr. Schafer: What's the point of it?

Mr. Alioto: I want to show his motive in making this deal for Safeway. He is the man you're relying on for

your good faith competition defense. You're saying you took his word—that you had to meet competition in good faith. He did discuss this conversation with the Morton people. He says he didn't tell them the whole story about it. He claims he discussed it with them within a period of time which, in the light of the letter that has gone in and the contract, could possibly be three or four or five days when he had this conversation from the time he started in as the Morton broker.

Mr. Schafer: It wouldn't make any difference if it was a day. It wouldn't make any difference at all. The record will not show that he ever communicated his threat to the Morton people. The record will show that he told Morton, the Morton Company, that he had been the broker for the Utah company. But we're not concerned about that. What we want to know is whether or not this threat is chargeable to the Morton Company. And there's no shred of evidence that the threat was ever communicated to Morton or that Morton ever adopted it or ratified it or any other legal language that is required. This simply has no relevance. As to what Morton was doing in the market.

[fol. 116] Mr. Alioto: We think, if your Honor please, that there will be a lot of evidence from which this jury can infer that this threat was communicated to Morton. The whole subsequent course of conduct would indicate that. Mr. Halvorsen admitted in his deposition that he was told about this conversation with the Rigbys at the Crossroads. He was told about it. He did say that he wasn't told about the threat.

Mr. Schafer: No.

Mr. Alioto: But he did say that he wasn't told about the threat, but the circumstances are such, followed by this predatory activity directed as the witness will admit I think against Utah Pie Company those circumstances are such that the jury can very easily infer from the time sequence involved that this—and the fact that the conversation was communicated, and by what they immediately started doing, directed against the Utah Pie Company, that

this whole conversation, including the threat, was in fact communicated to the Morton Company and that they were aware of the motives with which this man was acting.

Mr. Schafer: There is not going to be any evidence of that. The evidence is going to be that eight months after this conversation—

The Court: That's one thing I can't determine on its merits at this point. He says, Mr. Alioto, says there will be some evidence. You say there won't be some evidence. So I don't know whether there will be any evidence or not.

Mr. Schafer: Then it's a question of ordering the proof before we get into something that's highly inflammatory and prejudicial.

The Court: There isn't any question but what Chapman from the date just given was the Morton broker in this area; and I think he is sufficiently tied in to Morton now, and with what's been told to me on this discussion, I am perfectly clear he ought to be permitted to ask, Mr. Alioto ought to be permitted to ask leading questions in the examination of the man.

Now, you've got to start some way in a lawsuit, and I'm going to start right here. You say the order of proof. What do you want me to do first?

[fol. 117] Mr. Schafer: I think he ought to be required to show some connecting link, because if there is no connecting link between this threat and Morton, it's clearly inadmissible, and it's prejudicial error, and I think this is pretty inflammatory to the jury.

The Court: I don't think it's prejudicial error, and where the link claimed is many areas of circumstantial evidence, I don't see how you can help this cause any. How are you going to put in a circumstantial evidence case? How are you going to put it in, unless you start somewhere with it? In every piece of evidence that's offered, you say, "Irrelevant, prejudicial," and, "You've got to connect it up." Now, what we customarily do in here is say to counsel in a situation of this kind, "Do you intend to connect it up?" Mr. Alioto said he does.

Mr. Alioto: I certainly do.

The Court: And at that juncture—you know, this is the regular practice in the trial court: "Counsel, if you tell me you are going to connect it up, proceed."

Mr. Schafer: Your Honor, may I say that Mr. Alioto has indicated he is going to connect it up by the chronology of events, that the threat was made and shortly thereafter the price was made.

It is easily demonstrable, your Honor, that eight months elapsed between the two events. I submit to your Honor that you cannot connect up, on the basis of circumstantial evidence, where there is an elapse of eight months between the alleged threat and the price cut.

The Court: Mr. Schafer, in one of these cases frequently, more frequently than not—in fact, practically always—the evidence is circumstantial. The evidence of who is in the conspiracy is circumstantial. Whether there is a conspiracy is circumstantial. What was done and what was intended to be done, and who was intended to be hurt, and all the rest of it, is circumstantial.

Mr. Schafer: But, your Honor, that would be true if Mr. Chapman were a defendant or a co-conspirator. Then we could get some circumstantial evidence—

[fol. 118] The Court: He is getting pretty close to it.

Mr. Alioto: He is close to it.

Mr. Schafer: He is close to it, I agree.

The Court: Yes, he is very close.

Mr. Schafer: But he is not, as a legal matter, in it. He was a month away.

The Court: Well, I don't know. Maybe before we are through—

Mr. Schafer: He was not a broker at the time. He was an independent contractor, your Honor. I submit that even if he were Morton's broker at the time, this statement cannot be asserted against Morton. As a matter of law, the statements of independent contractors, the actual independent contractors, are not chargeable to their principal. So that even if—

The Court: I think that is certainly so. If that were what we were discussing, I would rule with you immediately, but it isn't.

Mr. Schafer: I had thought it was, your Honor.

The Court: The objection is overruled. I think it has been established that there is close enough connection with the frozen pie business in Utah, frozen pie business elsewhere, Mr. Chapman's connection with Morton and with the Continental Baking Company, that you may proceed to ask leading questions about it.

Mr. Lamb: If your Honor please—

The Court: Surely.

Mr. Lamb: On behalf of my client Pet, I should like instructions as to whether or not the testimony of Mr. Chapman will be subject to a motion to strike unless the plaintiff should connect it in some way with the alleged conspiracy among Pet, Carnation, and Continental.

The Court: I should suppose that is always true in a situation of this kind.

[fol. 119] Mr. Billings: I just didn't want to be in the position of waiving it, your Honor. We raised it earlier in the trial.

The Court: Yes. And earlier in the trial when it was raised, I thought there was a sufficient connection in time that we ought to permit him to inquire into it, and I still think so. And I think so more strongly now because something else has come up, and that is the connection of Chapman with Continental and with Morton, and, sketchy as it is, I think it is not sufficient at this juncture. I think if we had no undertaking on the part of Mr. Alioto that this would be connected up with further evidence, circumstantial evidence, of the sort to which he refers, I think we would have to exclude it at this point. But upon his assurance that there is circumstantial evidence I am going to hear it.

Mr. Billings: May we, for the record, your Honor, note our objection on the ground it is irrelevant and immaterial as to the defendant Carnation Company, on the grounds heretofore expressed by Mr. Schafer, and, on the second

ground, that he certainly has no connection with the Carnation Company and he is an independent contractor so far as the alleged co-conspirator.

The Court: You see, I don't know whether he has any connection with Carnation. Who are the conspirators here? I don't know that. Surprising things happen along the way in these trials.

You have got to start somewhere. I suppose that there never was an antitrust suit that wasn't proved by circumstantial evidence. There may be some exceptions to that. I have tried a lot of them. Every one I ever tried was largely circumstantial. You get the proof in, circumstantial proof in, proof of circumstances, proof of conduct, proof of relationships between people, what did they do, and what did they say, and when and where and how and why; you get that all in, and then you have to take a look at it and ask yourself, if you are the judge, whether a finding of conspiracy or connection, in this instance, is fairly and reasonably warranted, not required, warranted; and you tell the jury that very seldom—this is one of my instructions, and you will hear it—very seldom are you able to prove one of these double damage cases against defendant charged with violations of the antitrust act without the use of circumstantial evidence. Seldom do you have direct testimony; seldom do you have direct evidence.

[fol. 120] They don't confess, you know. They don't come in and put it in writing here generally. You have to put together, as Mr. Alioto said in the beginning—and you all know that better than I do, you antitrust lawyers—you have to take the facts and circumstances, you have to see how people act in relation to each other and in relation to the plaintiff, what they did and when and how and why, and what happened and under what circumstances, and put it together and ask yourself, is it fair to infer from the fact and proof that these were the intents and purposes and this was the conduct indeed of the defendants.

Now, in a case of that kind you have to start somewhere. You can't prove it all at once. And Mr. Alioto is starting

here. I am going to permit him to proceed here. I am going to permit him to proceed, upon the showing that is made here, by way of leading questions, if he wants to.

I think this fellow is pretty well tied up with Morton, if he has been their broker here over the long period of time to which he just testified and if he has been making threats against the Utah Pie Company. I don't share the view you have, Mr. Schafer, about that. If he has been making threats of this kind, I would like to see what he did following those threats and what Morton did and what Continental did, what these defendants did. I would like to see whether there is any connection or not.

Mr. Schafer: I appreciate that, your Honor.

The Court: Not for my satisfaction, but I think the jury is entitled to see that.

Mr. Schafer: I was going to suggest, your Honor, in that connection, whether your Honor would consider—I know we are all concerned about voiding prejudicial error, and I was wondering whether or not your Honor would consider, in that connection, hearing this evidence as to the connecting link—

The Court: No.

Mr. Schafer: (Continuing) —without the jury being here.

The Court: I am not going to try this lawsuit twice.

[fol. 121] Mr. Schafer: I just wanted to make that suggestion, your Honor.

The Court: All right.

Mr. Schafer: And on the second point, of cross-examination, I take it your Honor does not want me to make any more objections, that I have my exception in the record.

The Court: I am taking the position that this man is very likely a hostile witness; at least, I am satisfied that there is such a possibility of it that we are going to permit him to proceed. If a man goes around making threats of the kind it is said he made and then becomes a broker for Morton in the frozen pie business, directly in competition with the Utah Pie Company, I would like to find out what is going on, and I think the best way to find out is to let counsel ask some leading questions.

Mr. Schafer: In making that decision, your Honor, your Honor should be aware that there were not "plural" threats but there was one threat made in the heat of anger, one time. So there were not "threats." There was one statement.

The Court: Well, all right. I am going to take that position, for better or for worse. I am going to overrule your objection, and I am going to permit Mr. Alioto to ask leading questions and treat him as a hostile witness. Very well.

Bring in the jury.

. . . . . .

By Mr. Alioto:

Q. Let me just reframe the question. At that meeting at the Crossroads, Mr. Rigby told you, in substance and effect, didn't he, that he didn't think there was much room for a brokerage commission on his sales to Associated Foods?

A. That's right.

Q. And you were working for Associated Foods at that very moment, weren't you?

A. That is correct.

Q. The moment of the meeting?

A. That is correct.

Q. Then you told him didn't you, that he should raise his price to Associated Foods?

A. Not at that meeting, no, sir.

Q. You mean you told him shortly thereafter?

A. I think at the meeting that we held in the plant. I don't remember any statement like that there.

[fol. 122] Q. That came later, then. All right. Now, at this meeting Mr. Rigby told you he would consider it, did he not?

A. Yes, sir.

Q. Did you tell him at that time how much brokerage you expected on this arrangement?

A. I don't believe we arrived at a figure *than*—or not.

Q. Now Mr. Chapman, did you have a further meeting with Mr. Rigby thereafter?

A. Yes.

Q. And would that be approximately two weeks later?

A. I can't fix the exact time.

Q. Well, would you estimate it to be about two weeks later?

A. It could have been.

Q. Who was at that second meeting?

A. The owners of Utah Pie Company.

Q. Who were they?

A. Well, I don't know their names now. I only met them once.

Q. You talked to Gaylen Rigby? He was there?

A. That's right.

Q. And you talked to his father, is that correct?

A. That is correct.

Q. And you talked to his uncle?

A. That is correct.

Q. And his cousins were also there, were they not?

A. They were in and out of the meeting.

Q. They were in there, too. Now, at that time you further discussed this question of your being a broker for them, is that correct?

A. That is correct.

Q. And didn't they tell you at that time that they didn't see how they could squeeze a brokerage out of their present sales to your then employer Associated Grocers?

A. That's right.

Q. And didn't you tell them at that point that the way to do it would be to raise the price?

A. That is correct.

Q. Now, the record in this case shows, Mr. Chapman, by reference to Exhibit 4, that the price to Associated Grocers at that time was $3.70 for apple. It take it from the fact you made that statement that you believe then that the market could legitimately stand an increase.

A. Are you referring to the 3.70 price?

Q. Yes.

A. Whose price was that?

Q. The record in this case shows—let's see, excuse me. What was the year involved? What was the year of this meeting?

A. '60.

Q. Yes. Now, the record in this case shows—let me be exact. Two is the customer. The record in this case shows [fol. 123] a 3.16 price for 1960. I was reading 1959. You are correct about that. A 3.16 price. The question is: I take it from the fact that you suggested to them that they should raise the price that you believed the market could legitimately stand an increase at that time?

A. I believe the correct price was $3, sir.

Q. Well, regardless of what it was at the time—we will establish that independently—I take it from the fact that you suggested to them that they should increase the price—

A. That is correct.

Q. (Continuing) —that you believed at that time that the market could legitimately stand an increase?

A. That is right.

Q. In other words, you wouldn't have suggested to the Rigbys that they should increase the price to your then employer unless you thought it was a fair thing to do?

A. That's correct.

Q. And so you made these suggestions to them, is that correct?

A. Correct.

Q. And you suggested to them at this plant meeting that they should raise the price and pay you your brokerage out of that increase?

A. That's correct.

Q. And they at that time told you that they didn't know what they would be able to tell Associated Grocers as a reason for raising the price; in other words, they couldn't tell them they were doing it just to pay you a commission. Didn't they say that?

A. That's right.

Q. And you made the suggestion to them that they should tell Associated Grocers instead that the price of ingredients had gone up and that is why they were raising it?

A. That's correct.

Q. Now, at that second meeting at the plant did you tell them at that time that unless—if you didn't get the Utah Pie account that you would go out and get another pie account?

A. I don't remember, but I could have.

Q. At that second meeting didn't you also tell them that the Intermountain pie market was a good market?

A. Yes.

Q. And it was, in fact, a good market, wasn't it?

A. Yes.

Q. Was there any conclusion that came out of that second meeting at the plant?

A. I don't believe that there was.

Q. When was the next time you heard from any of the Rigbys about this matter?

A. I believe Gaylen called me.

Q. Gaylen?

A. Mr. Rigby.

Q. Gaylen Rigby, incidentally, the young man who sits there, was the man that you had dealt with as a buyer for Associated?

A. That is right.

[fol. 124] Q. And he telephoned you, is that correct?

A. That's right.

Q. And what did he tell you over the telephone on this third conversation?

A. He told me that they had decided to go along with my suggestions and they would appoint me their broker.

Q. Approximately how long elapsed between your visit to the plant where you talked to all of them and this third telephone conversation?

A. Three days to a week. I couldn't pin it down.

Q. All right. Then when was the next time you heard from Gaylen about this matter?

A. October 3.

Q. October 3?

A. Yes, sir.

Q. Was this in a telephone conversation?

A. Yes, sir.

Q. Did he call you or did you call him?

A. He called me.

Q. You, of course, know his voice?

A. Yes, sir.

Q. And you are sure it was he?

A. Yes.

Q. Now, tell us the substance of that conversation.

A. He told me that they had discussed—talked it over again with the family, and they had decided not to make me their broker.

Q. What did you say to him at that point?

A. I don't know exactly what I did say. I was very mad.

Q. Didn't you tell him, in substance or effect, that you were going to go out and get another pie account and that you were going to get the Utah Pie Company?

A. I could have said that in anger, yes, sir.

Q. You did say it, didn't you?

A. I don't know that I did.

Q. Isn't it your best recollection that you said it?

A. No, sir.

Q. Didn't you certainly have it in mind?

A. I could have had it in mind, yes.

Q. You did have it in mind, didn't you?

A. Yes.

Q. At the time of the conversation?

A. That's right.

Q. So you probably said what you had in mind?

A. I don't know that I did.

Q. And you meant it, didn't you? Whatever you said, you meant?

A. Yes.

Q. Now, you say that that conversation was October 3?

A. Yes, sir.

Q. This letter in evidence states that you are appointed as a broker for Morton—here is the language:

"We have just been advised and confirm that on the effective date shown here, September 26, 1960, you became the Morton broker for the State of Utah, Idaho, and Northern Nevada."

[fol. 125] How long after your telephone conversation with Gaylen Rigby did you have any contact with Mr. Halvorsen?

A. Approximately two weeks.

Q. Do you call two weeks "shortly after that"?

A. I would say it was about two weeks, ten days, it might have even been a week. I couldn't pin it down exactly.

Q. It might even have been a couple of days?

A. It was longer than that.

Q. You had known Mr. Halvorsen prior to that time, hadn't you?

A. Yes, sir.

Q. And Mr. Halvorsen was some kind of a sales manager, a Western sales manager for the Morton Company, or the Continental Baking Company?

A. He was regional sales manager for Morton Frozen Foods.

Q. And you had dealt with Mr. Halvorsen when you were with Associated Grocers?

A. That is correct.

Q. And had you been buying his pies at Associated Grocers at the time you left Associated Grocers in 1960?

A. No, sir.

Q. They had been out of Associated Grocers for some time?

A. Several years.

Q. Where did you have your conversation with Mr. Halvorsen?

A. Over the telephone.

Q. Where was he and where were you?

A. I was in Salt Lake; he was in, I assume, his office in Redwood City in California.

Q. Who made the contact, Mr. Chapman?

A. Mr. Halvorsen.

Q. He contacted you?

A. Correct.

Q. What did he say?

A. He said that he had heard from Mr. Les Michaelson, of Minute Maid, that I was in the brokerage business and I might be interested in handling his Morton line.

Q. Did you tell him you were?

A. Yes, sir.

Q. Now, at this time, Mr. Chapman, did you tell him about the fact that you had had any conversations at all with the Rigbys?

A. I don't believe so.

Q. Did you tell him at any time?

A. I believe I told him when he met me in Continental Baking Company office on our second meeting.

Q. Let's exhaust this first meeting first.

A. All right.

Q. What else was said at that conversation?

A. He said he would be up in Salt Lake in a few days and we would get together and further discuss the matter.

Q. Did he then come to Salt Lake City?

A. He did, sir.

[fol. 126] Q. Did you have a meeting with him?

A. Yes, sir.

Q. Was it just a few days after the phone call?

A. Yes.

Q. Where was the meeting held?

A. At the office of the Continental Baking Company in Salt Lake City.

Q. Who was present?

A. Dick Halvorsen and myself.

Q. Now, at that time you told him, didn't you, that you had had these conversations with the Rigbys?

A. Yes.

Q. And you told him the substance of these conversations you had had with the Rigbys?

A. Right.

Q. And you told him, presumably, or basically all that you told the Rigbys?

A. That is correct.

Q. And you told him at this time, didn't you, that you were pretty sore at the Rigbys?

A. No, sir, I did not.

Q. Did you tell him that you were very friendly with them?

A. No, sir.

Q. Did you tell him at that time that you had proposed to the Rigbys that they could very easily increase their price in order to pay you this brokerage?

A. I don't believe we discussed that problem at all.

Q. Did you discuss your own brokerage with him?

A. Yes, I did.

Q. Now, you discussed with him, didn't you, the possibilities in that Utah market?

A. Yes.

Q. And I take it you told him exactly what you told the Rigbys earlier, that it was a good market?

A. I did.

Q. And that if Continental hired you, you would get a share of that market for Continental that they didn't have at that moment?

A. I told him I would do my best.

Q. Didn't you tell him that you believed that you could get a share of the market which at that moment they didn't have?

A. No, I did not.

Q. Didn't you tell him, in substance or effect, that you believed you could get the Associated Grocers account?

A. No, sir.

Q. At the time that you were speaking to Mr. Halvorsen in the Continental Baking Office, at that time—and, as a matter of fact during all the times here involved—there were only about three or four customers in this area that controlled about 90 per cent of the business, weren't there?

A. Correct.

Q. Who were they? Would you be good enough to tell the Court and jury, please, sir.

A. Associated Grocer, Safeway Stores, Utah Wholesale Company, and the American Food Stores in Ogden.

[fol. 127] Q. You have already identified Associated Grocers. The Utah Wholesale Grocers was not a buying cooperative, was it? It was a commercial wholesaler of foods?

A. Right.

Q. Safeway Store, of course, is a chain operation?

A. Right.

Q. Now, the American Food Store in Ogden, about which we have already heard something—what is the nature of that organization?

A. That is a company that operates a chain of their own stores.

It would be similar to Safeway.

Q. Approximately how many stores does that company operate?

A. At that time I think there were possibly ten.

Q. Approximately how many stores does Safeway operate in the Intermountain area, if you know, or did operate at that time?

A. Seventy-five.

Q. How many stores were affiliated with Associated Grocers?

A. I don't know the exact amount. Several hundred.

Q. It was about 400, wasn't it?

A. It could be. I don't know the—I don't have any idea.

Q. These Associated Grocers stores were located in Utah, Idaho, Montana?

A. Right.

Q. Any other states?

A. There is some lap-over into Nevada.

Q. Nevada?

A. And also Wyoming.

Q. Now, I take it that you discussed with Mr. Halvorsen the territory that would be embraced within your sales area?

A. That's right.

Q. I take it you also discussed with him the fact that the Utah Pie Company, because of its location, was the dominant factor in the business at that time.

A. We could have.

Q. Well, actually you did, didn't you?

A. I don't know that we did.

Q. Is it not your best recollection, at least, that you did?

A. I don't know.

Q. In the very nature of things that would have been one of the subjects to be discussed, wouldn't it?

A. We discussed the entire line.

Q. You discussed the entire competitive situation in the area, too, didn't you?

A. No. We discussed the entire line of Morton frozen foods, full line of baked goods, pot pies, and dinners.

Q. You had been the buyer for all of those items, had you not, when you were at Associated Grocers?

A. We bought some of those items, yes.

Q. What, if anything, did you tell Mr. Halvorsen on that occasion about your ability to get Associated Grocers as a customer?

A. I don't believe I told him anything.

[fol. 128] Q. Did you give him any reasons at that time as to why you believed that this was a good pie market, as you called it?

A. Because there were a great quantity of frozen pies being sold.

Q. And you knew that because of your experience with Associated?

A. That's right.

Q. Well, was that a better pie market than, say, any other areas in the country?

A. Well, I don't know. I don't know any of the other areas.

Q. All you told them was that this was a good one?

A. That's right.

Q. Now, at that point did Mr. Halvorsen tell you how much business they were doing in this area?

A. How much business?

Q. In frozen pies.

A. Morton was doing?

Q. Yes.

A. They were not doing any business.

Q. At all?

A. That's right.

Q. So your discussions were about acquiring new business, weren't they?

A. Correct.

Q. And not about holding existing business?

A. Right.

Q. Now, were you hired, then, by Morton?

A. Not at that time.

Q. How was it left between you and Mr. Halvorsen?

A. He said that he would notify me at a later date.

Q. Didn't he tell you that he was going to recommend your appointment for the area?

A. Yes, he did.

Q. And he said all he had to do was clear it with the boys back in New York?

A. Something to that effect.

Q. And did he mention the men in New York that he would clear it with?

A. No, he didn't.

Q. Did he tell you to get ready or to prepare yourself to go to work for them?

A. No.

Q. When did you actually leave Associated Grocers? When was the last day that you were paid by that company? Approximate it for us.

A. The last of September.

Q. Now, I take it that you further discussed with the Morton Company at this time that there was a very substantial potential in this market that you would try to get for them, and Mr. Halvorsen agreed with you, did he not, that there was a substantial potential in this market?

A. He knew that, because he had been in the market once before.

Q. When was the next time you heard from this gentleman?

A. I can pin that down, I believe, pretty well. I think it was October 26. It happened to be my birthday, and I believe it was also the same day that the Associated Grocers had a luncheon for me out at the Beau Brummel.

[fol. 129] Q. And was Mr. Halvorsen present at the luncheon?

A. No, sir. He called me on the phone.

Q. This was a telephone conversation. And he was in California, was he?

A. Redwood City.

Q. And what did he say to you in this telephone conversation?

A. He just confirmed the fact that I would become the broker for Morton Frozen Foods.

Q. And he told you to go ahead and start working?

A. I believe he said he would send me some price lists and various advertising materials, yes.

Q. Now, actually, the letter confirming your appointment as the broker for Morton's Frozen Foods is dated November 22, 1960. But you did start substantially before that time, didn't you?

A. I started the end of October.

Q. And he did send you these price lists before you received the letter?

A. Right.

Q. And presumably you went to work before you received that letter?

A. That's right.

Q. Now, we have agreed, I think, that these four customers you've named have about 90 per cent of all of the business in this area; that's correct, isn't it?

A. Yes, sir.

Q. I take it you immediately made a contact with these people?

A. I did.

Q. And what was the first organization you contacted?

A. I don't know.

Q. Well, did you contact Associated Grocers?

A. I don't know who I contacted.

Q. Well—

A. I contacted everybody in the market, but I don't know if I contacted them first or not.

Q. Well, without trying to designate who was first or who was second, can you tell us whether or not shortly after your appointment as a broker you did in fact contact the Associated Grocers, your ex-employer?

A. They would have been one of them.

Q. All right. And who did you talk to there? With whom did you speak there?

A. Claude Purles.

Q. Claude Purles?

A. Right.

Q. That's P-u-r-l-e-s?

A. Right.

Q. And Mr. Purles is the gentleman sitting in the courtroom now?

A. Yes, that's right.

Q. And about when was it that you contacted him?

A. I don't know.

Q. Would it be October?

A. It could have been, or it could have been the fore part of November.

Q. Now, I take it you went right to work when Halvorsen gave you the go ahead signal?

A. I think I did.

[fol. 130] Q. Okay. Now, at that time did you tell him that you would be able to make him a very attractive price if he dealt with you?

A. No, sir.

Q. Well, did you have a price to work with at that time?

A. I believe we had an advertising billback.

Q. An advertising billback. Now, would you be good enough to tell the Court and jury what that means?

A. An advertising billback is where the product is billed at a particular price and the distributor or the wholesaler must advertise to qualify it for advertising money. He does not receive the advertising money unless he performs a function such as advertising in the newspaper with a tear sheet as a proof.

Q. And was advertising in the newspapers one of the things on which you paid off?

A. Yes.

Q. You gave the allowance?

A. Yes.

Q. Now, of course, that particular retailer had to pay the newspaper for the advertising allowance, didn't he?

Mr. Schafer: Pay the newspaper for the advertising allowance?

By Mr. Alioto:

Q. He had to pay the newspaper for the advertising, didn't he?

A. Yes.

Q. And then he received a portion of his advertising expense from you in the form of this advertising allowance?

A. Right.

Q. But he had to prove that to you by bringing the newspaper itself and showing it to you?

A. That's correct.

Q. And then I take it you sent that newspaper clipping to your officials in the Morton Company?

A. That's right.

Q. And they gave him the credit?

A. Right.

Q. Now, when you immediately started out, after having been employed by Morton, you asked for and received, didn't you, a special promotional allowance of some kind?

A. I think it was an advertising allowance.

Q. How much?

A. I don't remember.

Q. Was it 42 cents?

A. I don't know.

Q. Was it a larger allowance than was generally being given to the other purchasers from Morton in other areas?

A. I have no way of knowing that.

Q. Who fixed the amount of that advertising allowance with which you started out?

A. I would assume the regional sales manager.

Q. Who was the regional sales manager?

A. Mr. Dick Halvorsen.

Q. Did he fix that without reference to any recommendations made by you, or did you tell him what you thought was necessary to get new business in the area?

A. I don't know how that was arrived at at that time.

[fol. 131] Q. Well, he took your recommendations, didn't he, about the competitive situation in the area? Right, didn't he?

A. Right.

Q. I mean, you gave him your recommendations? Correct?

A. Right.

Q. You told him in substance or effect what was necessary for you folks to get into the business here?

A. Well, an advertising allowance would never get us into business here.

Q. Well, you mean that you didn't expect to make sales when you went to see these folks with this advertising allowance?

A. Well, I tried. I didn't know if it would work here or not.

Q. In any event, an advertising allowance is not a price cut?

A. No, it is not.

Q. There is a difference, is there not, between a price cut and an advertising allowance?

A. Yes.

Q. Now, did you approach the Safeway Company for the purpose of getting new business there?

A. I approached every buyer in the entire market.

Q. Did you have any business with Safeway when you started?

A. No.

Q. So when you talked to the Safeway people, you were trying to get new business?

A. Right.

Q. When did you first start talking to Safeway?

A. Shortly after I was made broker.

Q. Did you get any business from them shortly after you were made broker?

A. No, sir.

Q. Did there finally come a time when you did get business from Safeway?

A. Yes, sir.

Q. And that was approximately June of 1961, was it not?

A. That is correct.

Q. I show you a document which has already been marked in evidence as Plaintiff's Exhibit 15. Would you be good enough to state, Mr. Chapman, whether or not that's your handwriting on that document?

A. Yes, sir, that's my handwriting.

Q. Now, you'll notice that there is a price you've offered Safeway here of $2.85 a dozen in Salt Lake City and $2.55 a dozen if they picked it up in Watsonville. That's correct, is it not?

A. Right.

Q. And that $2.55 did not involve in any way, did it, any advertising allowance?

A. That's right.

Q. It was a straight price cut?

A. That's right.

Q. And Safeway didn't have to advertise or do anything at all in order to get that price?

A. We knew that they would advertise if they got the lowest price.

Q. Well, it's a fact, is it not, however, that the $2.55 represented a straight price?

A. Yes.

Q. To Safeway?

A. Yes.

Q. And it was a price cut from the Morton's list?

A. Yes.

[fol. 132] Q. Now, who authorized you to make that price cut to Safeway?

A. Mr. Dick Halvorsen.

Q. Who was it in the Safeway organization you talked to?

A. I talked to a Mr. Mike Walsh and a Mr. Leonard Henzke.

Q. Now, you know, do you not, that at that same time the price in California by Morton was approximately $4.00?

A. No, I don't.

Q. Didn't you know it?

A. No, sir, I don't know of any price other than the market that I am in.

Q. Didn't you get the price list from Morton, Mr. Chapman?

A. The California price list?

Q. Yes, the California price list. Didn't you get that from Morton?

A. Yes.

Q. Wasn't the California price list on the same sheet that the Utah price list was on?

A. It could have been. I don't know if it was. If it says "California" on there, then it was.

Q. Here's one Plaintiff's Exhibit 8. That's a Morton price list, isn't it?

A. Yes.

Q. And on the side it says, "Effective in States of California, Arizona, Washington, Oregon, Utah, Montana, Nevada, and Idaho"?

A. Correct.

Q. Now, you had these prices all the time in your office, didn't you?

A. Yes.

Q. And you have them even today?

A. Yes.

Q. And you know that there was a western price list that covers both California and Utah?

A. Well, that's the base price list.

Q. So that you knew at the time that you had this $2.55 price, advertising allowances, that the basic price list was $4.00, the basic price was $4.00, in these other states?

A. Basic price could have been $4.00, but he could have had all sorts of advertising billbacks.

Q. All right. Now, an advertising billback, again, is not a price cut, is it?

A. No.

Q. You get consideration for it?

A. You get consideration if you have a cheap price.

Q. And the grocer has to pay money to advertise, doesn't he, particularly if it's newspaper advertising?

A. He can put in a pretty small ad, yes.

Q. You mean that you would accept some kind of a subterfuge for your advertising allowance?

A. Not a subterfuge. You have to have an ad.

Q. You get real value, don't you?

A. Sometimes.

Q. Or at least that's the idea of your allowance is to get the advertising?

A. Yes.

[fol. 133] Q. You don't regard it as some kind of a fictitious masquerade, do you?

A. Oh, no.

Q. Okay. Then, you knew at the time that you were authorized to pay this $2.55 price that there was a basic price of $4.00 in California?

A. That's correct.

Q. And you also knew, didn't you, that California was where the plant was?

A. That's right.

Q. When did you first tell anybody in the Safeway organization that you were now prepared to give them a $2.55 price?

A. The day I made my presentation.

Q. You had an oral conversation, then, Mr. Chapman, with these gentlemen from Safeway?

A. Yes.

Q. And where was that meeting held?

A. The Safeway district office.

Q. And you've indicated that Mr. Walsh was present?

A. That's right.

Q. And I missed the pronunciation—

A. Mr. Henzke.

Q. Henzke? Do you want to spell that for the reporter?

A. I believe it's H-e-n-z-k-e.

Q. Who had set up this meeting, Mr. Chapman?

A. No one set up the meeting.

Q. Before you walked in to that meeting, had you been authorized by Mr. Halvorsen or Mr. Vail to offer Safeway a $2.55 price?

A. I had been authorized to offer everyone in the market.

Q. Okay. That basically includes these four buyers we spoke about earlier?

A. Correct.

Q. You had been authorized to offer everybody $2.55?

A. That is correct.

Q. Now, how long before your meeting with the Safeway group had you received this authorization?

A. I'd say about four days.

Q. Now, it is a fact, is it not—you mean four days before—

A. I think three or four days prior to this.

Q. This is dated June 16?

A. Yes.

Q. So you had received your authorization approximately on June 12 or 13; is that correct?

A. I think so.

Q. Now, at that time the Utah Pie Company was selling for $3.10, wasn't it?

A. On apple pies, yes.

Q. On apple pies?

A. That's right.

Q. And you knew that Utah Pie Company was selling for $3.10?

A. That's right.

Q. And that's the only price you had heard from any of these customers as to what the Utah Pie Company was selling for? $3.10?

A. $3.10.

[fol. 134] Q. Well, then, obviously you didn't offer this $2.55 price to meet the competition of a $3.10 price, did you?

A. The price was offered to try and get some business from Safeway or any of the other wholesalers in the area.

Q. Mr. Chapman, would you be good enough to listen to my question because it does have something significant in this lawsuit.

A. All right.

Q. You did not offer that $2.55 price to meet the $3.10 price, did you?

A. I don't know if I can answer—I don't know how to answer that.

Q. You recognize, don't you, that $2.55 is considerably below $3.10, even making allowances for the difference in ounces?

Mr. Schafer: Your Honor, I object to this line of interrogation, because it assumes the apples and oranges argument that Mr. Alioto objected to this morning. The $2.55 price is a price quoted f.o.b. California. Anybody that buys it down there has to truck it up here. It costs 30 cents to truck it up here.

* * * * * * *

By Mr. Alioto:

Q. Mr. Chapman, when I showed you this Exhibit 15, which is in your handwriting, do you recall I pointed two prices out to you, one a $2.55 price f.o.b. Watsonville, and the other one a $2.85 price delivered here?

A. Correct.

Q. And you remember I pointed that out to you?

A. Yes.

Q. Now, you have that distinction very well in mind; is that correct?

A. That's right.

Q. Now, when you talked to the Safeway Company, you spoke to them about the fact that they would pick up part of their order in Watsonville in their own trucks, did you not?

[fol. 135] A. I said it could be done.

Q. Yes. And that's the way ultimately it was done, wasn't it?

A. Half of it was, and half of it wasn't.

Q. Now, the total order was what? 15,000 cases, finally?

A. 15,000 cases.

Q. And 7500 cases were picked up in Watsonville? Is that right?

A. That's right.

Q. And 7500 were delivered here by common carrier?

A. Correct.

Q. And the price delivered here was $2.85 on that portion that was delivered by common carrier?

A. Right.

Q. And the price that Safeway paid you for that portion if picked up itself in Watsonville was $2.55?

A. That's right.

Q. Now then, at the time that you made Safeway this offer of $2.55 f.o.b. Watsonville and $2.85 delivered in Salt Lake City, did you inquire of Safeway whether or not—or, what price it was that you had to beat, or meet?

A. I was trying to get some business in the Salt Lake market.

Q. New business?

The Court: Now, just answer the question. You are not answering counsel's question.

The Witness: Would you repeat the question again?

Mr. Alioto: Do you want to read it to him?

(Question read.)

A. No.

By Mr. Alioto:

Q. Did they tell you that there was any particular price that you had to meet or beat in order to get the business?

A. No.

Q. And you were certainly not trying to hold a customer, then; you were trying to get new business?

A. Right.

Q. Did you inquire of Mr. Halvorsen whether or not that 2.55 price f.o.b. Watsonville was below their cost of doing business?

A. I did not.

Q. Did Mr. Halvorsen volunteer anything about that?

A. No, sir.

Q. Did Mr. Halvorsen say, in substance or effect, that "This is a pretty lousy price, but if this is what you need, go ahead"?

A. He did not.

Q. Did he say it was a good price so far as they were concerned?

A. I don't think he said one way or the other.

[fol. 136] Q. Was Mr. Halvorsen the only one you talked to in the company about this matter?

A. That's right.

Q. Do you know Mr. Vail?

A. No.

Q. Have you ever met him?

A. I have only met Mr. Halvorsen and in the last couple of months a Mr. Ralph Bennett, with the company. I didn't know any other member of Morton.

Q. Mr. Halvorsen is the only one you talked about it with?

A. That's right.

Q. Was it in a telephone conversation that you spoke to Mr. Halvorsen about getting authority on this 2.55 price?

A. That is correct.

Q. There was no face-to-face conference about it, is that correct?

A. Right.

Q. Did you write him a letter explaining why it was necessary that you have this 2.55 price?

A. No, sir, I did not.

Mr. Schafer: Your Honor, if I may object again, we are back on the 2.55 trail.

The Court: I am going to overrule the objection. It seems to me to have been made perfectly clear.

* * * * * * * *

A. I had spent eight months in this market and hadn't been able to get any business at all. Safeway at this time were buying Swiss Miss pies at 3.25 a dozen. Associated

was buying Frost 'N' Flame at 3.10. Utah Pie Company at the same time was discussing a private label with Grand Central Markets on its Mayfresh. And I assumed that that would be the same price pie as Frost 'N' Flame.

Q. You assumed that?

A. I was led to believe it by the man that was working the deal.

Q. Who was the man working the deal?

[fol. 137] A. Mr. Sid Boone, Sid Boone.

Q. And he told you this?

A. He indicated that the pie would be a cheap price.

Q. Did he tell you the pie was going to be $3.10?

A. He did not.

Q. You just assumed that, then?

A. He said it would be a cheap price.

Q. All right. And you assumed that was 3.10?

A. Yes.

Q. This is what you told Mr. Halvorsen?

A. That's right.

Q. Now, then, did you first suggest to Mr. Halvorsen the 2.55 price f.o.b. Watsonville, or did he suggest it to you?

A. I don't know how it was worked out.

Q. Did you, at or about the same time, suggest this 2.55 price to Associated Grocers?

A. Yes.

Q. Your former employer?

A. It was offered to everyone in the market.

Q. With whom did you orally, personally negotiate with Associated Grocers at 2.55 f.o.b. Watsonville?

A. Yes, I personally called on Associated Grocers.

Q. And with whom did you negotiate in that connection?

A. Mr. Claude Purles.

Q. Had you known Mr. Purles prior to the negotiation?

A. Yes.

Q. Did he work for you at one time?

A. Yes.

Q. He was with Associated at the time you were the buyer?

A. He was the advertising manager.

Q. Was he under your jurisdiction at that time?

A. No.

Q. Where was it you talked to Mr. Purles?

A. In his office.

Q. Who was present?

A. I think just he and I.

Q. Did you tell him at that time that you were going to offer him a 2.55 price f.o.b. Watsonville?

A. I offered him a 2.85 delivered price, with a 30-cents-a-dozen pickup allowance.

Q. Did he tell you at that time whether or not he would pick up the pies in California?

A. He didn't say one way or the other.

Q. After you got the order, did he, in fact—did you get an order from him?

A. No.

Q. At the time that you were discussing this matter with Mr. Purles, did he tell you what price you had to meet or beat in order to get an order?

A. No.

Q. Was Mr. Purles a customer of yours at that time?

A. On other products, yes.

[fol. 138] Q. On frozen pies?

A. No.

Q. So here again you were attempting to get new business rather than to hold an old customer?

A. That's right.

Q. Whom else did you offer this 2.55 and 2.85 price to?

A. I offered it to Grocers Wholesale.

Q. Where are they located?

A. They were located here in Salt Lake City.

Q. And whom did you speak to there?

A. A Mr. Charlie Gamble.

Q. Charlie Gamble?

A. That's right.

Q. Had you known him prior to this time?

A. Yes.

Q. In what relation?

A. He had been the assistant manager of the Associated branch in Pocatello.

Q. As such did he work for you?

A. No.

Q. When you say "Associated," are you talking about the company that was your former employer?

A. Yes.

Q. And who was the assistant branch manager in Pocatello?

A. Right.

Q. I take it you had some business contacts with him at that time?

A. When I was with Associated, yes.

Q. Yes. And you hoped by virtue of those business contacts to land him as a new account for Morton, did you not?

A. That's right.

Q. And that is why you offered him this price?

A. That's right.

Q. So you obviously didn't offer him a price to keep a customer, but to get a new customer?

A. Right.

Q. In making your sales pitch to him, did you say, in substance or effect, that this was a very, very good price you were offering him?

A. I could have.

Q. Yes. And you told him, as a matter of fact, that it was a better price than the folks in California were paying, didn't you?

A. No.

Q. Did you indicate to him it was better than was being offered by Morton in the neighboring states?

A. No.

Q. It was, in fact, wasn't it?

A. It was different than the list price, yes.

Q. Yes, and better, different and better, to the customer?

A. (Nodding.)

Q. You are nodding.

A. Yes.

Q. Yes. Who else did you specifically offer this 2.55 price to f.o.b. Watsonville and 2.85 delivered here?

A. I offered it to Utah Wholesale Frozen Foods, American Food Stores in Ogden.

Q. With whom did you speak in Utah, Utah Wholesale?

A. Bill Eggett.

[fol. 139] Q. Would you spell it, please.

A. (Spelling) E-g-g-e-t-t.

Q. Where?

A. At his office.

Q. Who was present?

A. I think just he and I.

Q. Did you make the pitch to Safeway first, or to these other folks first?

A. I made the pitch to the other folks first.

Q. So you saw Mr. Eggett before you saw Safeway?

A. Yes.

Q. Would it be within a few days before you saw Safeway?

A. Yes.

Q. What did you tell Mr. Eggett?

A. I just told Mr. Eggett the same thing, that I was offering this pie at 2.85 delivered or 2.55 f.o.b. Watsonville.

Q. What did he say to you?

A. He told me he didn't think he would be interested.

Q. And then you discussed this matter with American Grocers?

A. American Food Stores.

Q. American Food Stores, thank you. That is in Ogden, Utah?

A. Yes.

Q. And with whom did you discuss it?

A. Mr. Elmer Degenhardt.

Q. Degener?

A. Degenhardt.

Q. Degenhardt?
A. Yes.
Q. Where was this?
A. In his office.
Q. In Ogden?
A. Yes.
Q. Who was present?
A. Just he and I.
Q. What did you tell him?
A. The same thing.
Q. What?
A. That we had an offering on these pies at 2.85 a dozen delivered or 2.55 picked up in Watsonville in truckload lots.
Q. What did he say?
A. I'm not certain if he gave me an order then or not.
Q. Now, in all of these transactions you did—I mean, as a result of these offerings, you did receive a 15,000 case order from Safeway, did you not?
A. I received a 7500 case order at first.
Q. From Safeway?
A. Safeway, right.
Q. Was that all apple?
A. No.
Q. What else was it?
A. Coconut custard.
Q. Where was that pie being manufactured?
A. Webster City, Iowa.
Q. How was Safeway going to pick that pie up in Watsonville if it was being manufactured in Webster City?
A. They had an inventory in Watsonville.
Q. So that pie got to Watsonville from Webster City, is that correct?
A. Right.
[fol. 140] Q. And then Safeway took it from there back to the Utah area?
A. Right.

Q. When did you get the repeat order of 7500 cases from Safeway?

A. I think about a week or so later.

Q. When were these two orders delivered, approximately?

A. The last part of June and about the middle of July.

Q. Now, you had 15,000 cases from Safeway. What did you get from any of the others?

A. I believe I got a truckload from Grocers Wholesale, half a truck from American Food Stores in Ogden.

Q. How many cases in a truck? When you say "truckload," what does that mean?

A. Twenty-four hundred. That is what we call a truck, 3,000 units.

Q. How many cases?

A. Twenty-four hundred.

Q. I am sorry, I didn't hear you. Twenty-four hundred cases you sold to whom?

A. I believe I sold 2400 cases to Grocers Wholesale.

Q. Yes.

A. And I believe there were 1200 cases to American Food Stores. I sold, I believe, 600 cases to AG in Pocatello, and I believe 600 cases to AG in Boise.

Q. Did you ever inquire of—excuse me. What is the name of the company in Pocatello?

A. Associated Food Stores.

The Court: AG.

By Mr. Alioto:

Q. Did you sell to anybody in Montana?

A. I couldn't sell in Montana, because we had a problem of getting merchandise in there and, although I was the broker for Montana, I couldn't—I didn't make any effort to make a sale up there.

Q. Now, you were not permitted, of course, to sell in Oregon and Washington, I take it?

A. No.

Q. And you didn't try to sell there?

A. That's right.

Q. That was handled by somebody else?

A. Yes.

Q. At a different price, different than 2.55?

A. Yes.

Q. You are nodding. Does that mean "yes"?

A. Yes.

Q. And higher than 2.55?

A. I don't know.

Q. Now, you say you did not sell to Associated Grocers here in Salt Lake, is that right?

A. That's correct.

Q. Did you go back and inquire of Mr. Purles why he didn't buy from you at that price?

A. Yes.

Q. What did he tell you?

A. He told me that he thought that the Utah Pie Company would come out with a price similar to that.

Q. Did he tell you, in substance or effect, that he had contacted the Utah Pie and they had come down to meet your offer?

[fol. 141] A. No, he did not.

Q. That is what happened, isn't it?

A. But he never told me.

Q. How did you find out it happened?

A. May I elaborate?

Mr. Schafer: Is the question how did Mr. Chapman find out the price?

Mr. Alioto: Yes.

Mr. Schafer: Or how did Mr. Chapman find out about some conversation?

Mr. Alioto: How did Mr. Chapman find out that Utah Pie met this offer of his in order to stay in Associated. That is the question. If you did find out.

A. I did find out.

By Mr. Alioto:

Q. How did you find out?

A. I was told.

Q. By whom?

A. I was told by a Mr. Mack Walsh that one of my competitors had dropped their price on apple pies to 2.75.

Q. That was after you had offered them this 2.55 price?

A. That was the same afternoon.

Q. It was after you had offered it to him?

A. That's right.

Q. Mack Walsh is with Safeway?

A. Right.

Q. So this would have to be after you had offered that price to Associated, since you talked to Associated first?

A. That's correct.

Q. In other words, you forced Utah Pie down to that 2.75 level, didn't you, by this offer?

A. I don't think so.

Q. This is what you knew would happen at the time you made this offer, wasn't it?

A. I didn't know.

Q. Well, now, as a prudent business man, didn't you expect that Utah Pie would try to keep an account they had had from at least the time that you were there and made the deal with them?

A. My offer was a spot offer. It was only limited to a very few weeks.

Q. Now, with respect, Mr. Chapman, to some of these other matters, the Utah Pie is a pretty good pie, isn't it?

A. I guess.

Q. And the Rigby plant is a well managed plant?

A. Yes.

Q. It has the advantage, of course, of location?

A. Yes, it does.

Q. It is the only plant in this area?

A. It is.

[fol. 142] Q. So it doesn't have to transport anything 750 miles to get it into Salt Lake City, does it?

A. That's right.

Q. In addition to that, it is an efficient plant, is it not?

Mr. Schafer: There is no showing, your Honor, that Mr. Chapman knows anything about the plant efficiency.

Mr. Alioto: He was in the plant.

The Court: We are going to find out, Mr. Schafer. That is what this interrogation is about. He can tell us about it.

A. I was in the plant once, Mr. Alioto.

The Court: Objection overruled.

By Mr. Alioto:

Q. For how many years prior to the time that you went with Morton had you been buying, or had you been doing business, with the Utah Pie Company at Associated Grocers?

A. I believe two.

Q. And you did visit the plant on the occasion of the conversation?

A. That was the only time, yes, sir.

Q. I take it you observed the fact that most of the family members were working there?

A. Yes.

Q. And you knew, I take it, that Gaylen Rigby, young Gaylen Rigby, was handling the outside work, all of the sales work?

A. That's right.

Q. And the other folks were handling the inside plant work?

A. That's right.

Q. Would you agree with me, Mr. Chapman, based on your experience in this business, that your 2.55 price was responsible for lowering the level of the whole market?

A. I wouldn't say so.

Q. Well, do you think it was—it had a tendency to raise the market?

A. No.

Q. Well, you knew, didn't you, at the time you offered it, that it had an obvious inherent tendency to lower the market, didn't you?

A. I wasn't trying to lower the market. I was trying to get some business.

Q. Didn't you know, from your experience as a business man, that the necessary effect of what you were doing was to lower the whole market? Didn't you know that?

A. No. I had an offering for a two-week period only.

[fol. 143] Q. Didn't you believe that it would have the effect of lowering the market, at least on 15,000 cases of pies to Safeway? Wasn't that obvious to you at that time?

A. Yes.

Q. Now, you knew at that time, didn't you, that the principal victim of any lowering of the market would be the Utah Pie Company?

A. Not necessarily.

Q. Who was doing most of the business in this area by virtue of its location?

A. I presented my price to Safeway. Utah Pie was not selling Safeway at that time.

Q. Didn't you present your price to Associated, too?

A. I presented them to everyone.

Q. And to Utah?

A. That's right.

Q. You presented them to everybody who was in this market?

A. That's right.

Q. At this price?

A. That's right.

Q. So if the market was, in fact, lowered by this—if later on the Court and jury come to accept this, that the market, in fact, was lowered by this, wasn't it obvious that the principal victim of the lowering of this level of the market was the Utah Pie Company?

A. He would have been if I had sold his customers.

Q. You did sell to some of his customers, didn't you?

A. What customers of his did I sell to?

Q. How about American in Ogden?

A. He wasn't selling to American in Ogden.

Q. Did you sell pies to anybody that had ever dealt with Utah Pie Company?

Mr. Schafer: What is the relevancy of that?

Mr. Alioto: All right, we can get at it another way. We will get at it another way with respect to the actual lowering of this price.

By Mr. Alioto:

Q. I asked you earlier, and I want to be sure that I am correct about this and that the record is clear on this—it is a little fuzzy in my mind: At the time you talked to Mr. Halvorsen of the Morton Company at the Continental Baking Company Office in Salt Lake City—

A. Yes.

Q. (Continuing) —just before your appointment as broker—

A. Yes.

Q. (Continuing) —it is true, is it not, that you did tell him about the substance of your conversations with the Rigbys just prior to that time?

A. I told him that I had talked to them, and I was go-
[fol. 144] ing to be their broker, but it had fallen through, yes.

* * * * * * *

Cross examination.

By Mr. Schafer:

Q. Mr. Chapman, did you ever tell Mr. Halvorsen that you had ever communicated any kind of a threat to the Utah Pie Company?

A. I did not.

Q. Did you ever tell anybody in the Morton Corporation that you had in any way threatened the Utah Pie Company?

A. No, sir.

Q. You were pretty mad at the Utah Pie Company, I take it, Mr. Chapman, at the time of that telephone conversation that you testified to?

A. Yes, I was.

Q. How long did you stay mad at the time?

A. What is the normal time, 20 minutes, half hour?

Q. You testified, in response to Mr. Alioto's question, Mr. Chapman, that you meant what you said when you said it over the telephone to Mr. Rigby.

A. I very likely did at that time.

Q. That statement was made in what I characterize as the heat of anger, in the heat of anger?

A. Yes.

Q. You sort of said the first thing that came into your head, didn't you?

A. That's right.

Q. Do you suppose there is any possibility, Mr. Chapman, in the Salt Lake City market, of going out and getting another pie account, and getting the Utah Pie Company?

A. You can't get another pie account and get another pie company when he has got the bulk of the business.

Q. The Utah Pie Company, you say, has the bulk of the business?

A. Yes.

Q. They had the bulk of the business at the time?

A. Yes.

Q. It has the bulk of the business now?

A. Yes.

Q. Has it got more business now than it had then?

A. I assume it has.

Mr. Alioto: That is leading and suggestive. I think counsel ought to examine the witness, if your Honor please—he is his own broker—without leading and suggesting answers to him.

[fol. 145] Mr. Schafer: I am clearly entitled to examine on leading questions, your Honor. In the first place, it is much the fastest way to proceed. In the second place, he is not my witness at all. He is an independent broker.

The Court: I have taken the position he is your witness.

Mr. Schafer: Don't you think it would be a much faster way to proceed, your Honor?

The Court: Yes. I suggested that earlier this afternoon. As long as the questions are not too serious, that is the way we will proceed. But when you get into something critical, don't lead him.

Mr. Schafer: Right.

By Mr. Schafer:

Q. You testified, Mr. Chapman, if I can recall it correctly, that you had had some conversations with Gaylen Rigby and some other people apparently within the company leading towards your becoming a broker for the Utah Pie Company.

A. That's correct.

Q. Can you tell us, Mr. Chapman, what you told the Rigbys by way of inducing them to appoint you as their broker. How did you, in effect, sell yourself?

A. I told them that I had what I felt were some very good ideas to help increase their volume of business. No. 1, I felt would necessarily immediately increase their volume, but would help them on their cost, was to work out a consigned stock arrangement with Associated Frozen Foods, and also to work it out so that instead of delivering in small quantities of pies, we would deliver in straight truck loads palatized.

I told them also that I felt I could get them some business in Idaho and, at the same time, I contacted a Mr. Spence Combie of Western States Brokerage, who represents the Umatilla Packing Company, and I discussed the problem of arranging for a backhaul on one of their frozen food trucks through Idaho and into the Northwest.

Q. You felt those ideas would be good for the Utah Pie Company?

A. Yes.

Q. You thought they would reduce their costs?

A. Yes.

Q. That they would get more sales?

A. Yes.

Q. You communicated those ideas to the Utah Pie Company representatives?

[fol. 146] A. I communicated some of them, I believe, yes.

Q. Can you tell us what their reaction was to your ideas?

A. I think they thought they were good. I also suggested that they discontinue their institutional advertising, that I didn't feel that it was good, that it wasn't doing them a job and it was costing them money. I believe they discontinued that shortly thereafter.

Q. So that, if I am correct, Mr. Chapman, on the chronology, in the latter two weeks or so of September you communicated these ideas to the Utah Pie Company as to how to lower their costs and increase their sales?

A. That's right.

Q. And did the Utah Pie Company, in effect, take you on as a broker during this time?

A. Yes.

Q. And they started paying you a brokerage commission during this time—

A. Yes.

Q. (Continuing) —that you were offering these ideas to them, and they paid you monies during this time, is that correct?

A. That's right.

Q. Do you know, Mr. Chapman, what the price was of Utah Pie Company on its sales to the Associated Stores in early September, 1960, just prior to the time you were signed on as broker by the company?

A. Are you referring to the apple pies?

Q. I was talking about apple pies, yes.

A. Three dollars a dozen.

Q. Three dollars a dozen?

A. Yes.

Q. Did the Utah Pie Company increase its price to the Associated Stores in the middle part of September of 1960?

A. As I understand, they did.

Q. Do you know how much they did?

A. I think it is 10 cents a dozen.

Q. Did they increase it more than 10 cents a dozen on a temporary basis?

A. I don't know.

Q. Did you have in mind, Mr. Chapman, in selling yourself to the Utah Pie Company and in making your recommendations to the Utah Pie Company as to how they could produce and distribute at a lower cost and how they could sell more pies—did you have in mind, in making your suggestions to them, that your method of compensation from them was a permanent way for you to compensated by them for your brokerage services?

A. We discussed everything very briefly, but I felt that if I had been given an opportunity there to use some of my ideas and do some of the things I would like to do, that I might have been able to increase their sales and so increase their volume, reduce their costs, so they wouldn't have to reduce their prices.

[fol. 147] Q. So they wouldn't have to raise their prices?

A. I beg your pardon, raise their prices.

Q. When you testified to Mr. Alioto, Mr. Chapman, that you communicated the substance of your conversations with the Utah Pie Company to Mr. Halvorsen, or Morton Company, did you mean to testify by that that you talked to him about the details of this prospective or actual brokerage arrangement with the Utah Pie Company?

A. None whatsoever.

Q. Am I correct in understanding, sir, that you meant to testify to Mr. Alioto that what you told Mr. Halvorsen was that you had a brokerage arrangement worked out with the Utah Pie Company which had fallen through?

A. That's correct.

Q. And Mr. Gaylen Rigby, as I understand the facts, called you on October 3, 1960?

A. That is correct.

Q. And that was the first day that you had gone into an independent brokerage business?

A. Yes.

Q. That was the first day that you were no longer working for the AG Stores as a buyer?

A. Yes.

Q. And as soon as you left AG Stores, Mr. Gaylen Rigby called you up and cancelled your brokerage arrangement?

A. Yes.

Q. I'd like to show you, Mr. Chapman, Plaintiff's Exhibit No. 4 which has been received in evidence; and this is an I.B.M. run. It's a little bit difficult to read, as Mr. Alioto has explained it to the jury; but this column indicates the flavor of the pie—I'm sorry, this column indicates the brand name of the pie; and pointing to the third column. And the fifth column of the study indicates the customer.

A. I see.

Q. And this first column indicates the date of sale.

A. Right.

Q. And I want you to review for me the facts that this study shows after the price of the Utah Pie Company to Associated Stores on apple pies of its Frost 'N' Flame label. Now, what was the price on September 2, 1960?

A. Three dollars a dozen.

Q. And that's what you've testified to when you were still a buyer?

A. Yes.

Q. Now, look at the price indicated for September 19, 1960.

A. $3.16 a dozen.

Q. So they increased the price 16 cents a dozen.

A. That's correct.

Q. By September 19 on the Frost 'N' Flame label. And then looking down with me to the next sale of the Frost 'N'

Flame. And then; am I correct, Mr. Chapman, what's the price—read to me the price on September 21, 1960, the Frost 'N' Flame label apple pie.

A. $3.16.

[fol. 148] Q. Again $3.16. And on September 23, 1960?

A. $3.16.

Q. And September 24?

A. $3.16.

Q. And then the next sale is on September 29. What's the price?

A. $3.16.

Q. And the next sale is on October 4?

A. $3.16.

Q. And then the next Frost 'N' Flame label is on October 10, 1960. What's that price?

A. $3.10.

Q. And is it your understanding that the price of Frost 'N' Flame apple pies to A.G. Stores stayed at $3.10 throughout the remainder of 1960 and through most of 1961?

A. Yes.

Q. So that the Utah Pie Company increased its price to Associated Stores by ten cents a dozen after terminating the relationship with you?

A. Correct.

Q. You testified, Mr. Chapman, that four customers, I think you said, controlled about 90 per cent of the business in the Salt Lake City market?

A. Yes.

Q. And you identified those as Associated Stores, Safeway, Utah Wholesale, and American Foods. Now, my question to you, Mr. Chapman, is who had the business with Associated Frozen Foods? I'm talking now, of course, about apple pies, cherry pies, boysenberry pies.

A. Utah Pie Company.

Q. Who had the business with Safeway?

A. Pet-Ritz. They handled, Safeway handled Swiss Miss, their label that was packed by Pet.

Q. So that Pet Milk Company had the Safeway business?

A. Yes.

Q. Basically. When I ask you the business, I'm talking about 90 per cent of the business, or whatever. And the Utah Wholesale, who had that business?

A. Utah Pie Company.

Q. And American Food Stores in Ogden. How was that business distributed?

A. We had business there. Morton, Frozen Foods, had business there.

Q. Were you the only supplier to American Food Stores?

A. I think Libby was also a supplier.

Q. Libby was a supplier. So that two out of the four major customers controlling 90 per cent of the business were in turn controlled and affected by Utah Pie Company?

A. Yes.

Q. In terms of the volume of their business. How can you account for the fact, Mr. Chapman, that during your period with Associated Stores, Food Stores, that the Utah Pie Company secured the majority of the business?

Mr. Alioto: That's objected to on the ground it calls for an opinion and conclusion of the witness.

[fol. 149] Mr. Schafer: He was a buyer at that time.

Mr. Alioto: He can ask what he said or done. But ask him how he accounts for the fact is a fish market question.

By Mr. Schafer:

Q. Why, Mr. Chapman, when you were a buyer for the Associated Stores, why did you buy almost all of your pies from the Utah Pie Company?

A. Because they had the cheapest price.

Q. And that price you testified was $3.00?

A. That's right.

Q. And you say there was no price as low as that on the market?

A. That's right.

Q. $3.10 was the cheapest price?

A. Three dollars.

Q. Three dollars. I'm sorry. I'm talking in 1960. And the Associated Stores, I think you said, were comprised of about 400 stores?

A. That's right.

Q. So that the Utah Pie Company with the lowest price in the market had almost all of the business in 400 stores?

A. Well—when we say 400 stores, we're talking about a 3-state area. They had all the business in the Utah area.

Q. I wanted to clarify that with you, Mr. Chapman, and see if my understanding was correct as to the nature of the Associated organization. When you said 400 stores, did you mean to just identify the Salt Lake City branch, or all of the branches combined?

A. All of the branches.

Q. And the Salt Lake City branch, I take it, is less than 400 stores?

A. Yes.

Q. How many is that, about?

A. Oh, I'd say a hundred fifty, a hundred seventy-five.

Q. And where are the other branches located?

A. They're located in Pocatello, Idaho, Helena, Montana, and they now have a branch in Boise, Idaho.

Q. And you had to sell each of the individual branches when you were a broker? I'm talking now of later in 1961. You had to sell each individual branch?

A. Yes.

Q. Mr. Alioto, Mr. Chapman, in inquiring as to your discussions with Mr. Halvorsen, identified the Utah Pie Company, if my notes are correct, as the dominant company in the market. Would you accept that?

A. Yes.

Q. You think the Utah Pie Company in 1960 and 1961 was the dominant company in the market?

A. Yes.

Q. Why do you say it was dominant, Mr. Chapman?

A. Because it had practically all of the business.

Q. Did it have the lowest price on the market?

A. Yes.

Q. When did the Utah Pie Company come into the business, in the frozen food business?

A. I believe the latter part of 1957.

[fol. 150] Q. And what products do they make, sir?

A. Fruit pies.

Q. And would you describe for the jury what you mean by fruit pies? What are their flavors?

A. There would be apple, cherry, boysenberry, peach, blueberry.

Q. And can I suggest mince? Would they also make mince?

A. Well, mince and pumpkin, they're not normally considered fruit.

Q. They are not fruit pies?

A. No, sir.

Q. I see. And they came into the business, you said about 1957?

A. I believe so.

Q. And you've said that in 1960 and 1961 the company was the lowest priced pie in the market. Was that true in 1958 and '59?

A. I believe it was.

Q. And in those years you were a buyer for the Associated frozen foods?

A. Right.

Q. And is it your recollection that during those years the lowest prices quoted to you were quoted by the Utah Pie Company?

A. I believe so.

Q. Did the Morton Company sell you, sir, or try to sell you, frozen fruit pies during the years 1957 through 1960, when you were—until you left Associated?

A. I believe '57 and possibly the early part of '58.

Q. Are you telling me that's when they made sales to you?

A. No, they made sales to us prior to that. They've been in here, I think, since 1955 or the end of—the end of 1955 or the first part of '56.

Q. And they made sales to you then, if I can understand your testimony, in 1956, 1957, and the early part of 1958?

A. I believe that's correct.

Q. And then they stopped making sales to you?

A. Well, they, they had no further representation in the market.

Q. Did they have representation in the market in 1959?

A. No.

Q. They were selling to you as the buyer for Associated Stores, they were selling you Morton pies prior to the time, I take it, that the Utah Pie Company started selling their flavor pies, fruit pies?

A. I believe that's correct.

Q. And as a buyer, Mr. Chapman, during the years in which the Utah Pie Company was quoting to you the lowest price on the market through these three or four years, was the Pet-Ritz Company and the Carnation Company trying to sell you their frozen fruit pies?

A. Yes, sir, they certainly were.

[fol. 151] Q. And were they priced as low as the plaintiff pies?

A. No, they were not.

Q. As I understand it, Mr. Chapman, when you became the broker for the Morton Company in the very end of October of 1960—and you testified that was on your birthday, I think you said—

A. The 26th.

Q. The 26th. And I meant to ask you, what was the party you talked about on October 26? You said the A.G. Stores gave you a party.

A. The staff of Associated gave me a going away party, a luncheon.

Q. I see. And that's what serves to refresh your recollection as to when you started with Morton?

A. Yes.

Q. And they gave you a present at that time?

A. Yes.

Q. Your leaving AG was cordial, I take it?

A. Yes.

Q. Had you told anybody at AG about working for the Utah Pie Company as a broker?

A. Yes.

Q. Who did you tell?

A. Claude Purles.

Q. Now, picking up at the time of your conversation with Mr. Halvorsen, Mr. Chapman, and your representation of the Morton line in the end of October, 1960, did you take on only the fruit pie line, or were there more products involved?

A. I took on the entire line, casseroles, meat pies, dinner, macaroni and cheese, spaghetti and meat; I think there's 53 items.

Q. And in your conversation with Mr. Halvorsen in which you discussed whether or not you would become a broker for the Utah Pie Company—I'm sorry, for the Morton Company—was your discussion limited to fruit pies with him?

A. No, it was a full line.

Q. Was there any more discussion of fruit pies than there was of any other products in the line?

A. No.

Q. You say that he called you on the telephone. Your first contact with Mr. Halvorsen was that he called you on the telephone?

A. Yes.

Q. And he said that he had heard from Les Michaelsen of Minute Maid that you were available as a broker?

A. That's right.

Q. Can you recall for us what your reaction to his suggestion was that you take on the Morton line?

A. Well, I wasn't too enthusiastic about it.

Q. You weren't? Why not?

A. Well—

Mr. Alioto: That's objected to as not relevant to any issue in the case and calling for the opinion and conclusion, and the unexpressed mental attitude of this witness.

[fol. 152] Mr. Schafer: It was expressed. It was expressed to Mr. Halvorsen, I expect to show, and Mr. Alioto has asked this man about the conversation, as I asked him.

The Court: Overruled.

By Mr. Schafer:

Q. Why weren't you enthusiastic, if I may use that word, Mr. Chapman, about taking on the Morton line?

A. It represented, as I said before, I think 53 items; and that represented a great deal of work to try and get any or all of those items started.

Q. You say "started." You mean by that—

A. I mean getting someone to buy them.

Q. Was Morton a known name in the business, sir?

A. No, they had been out of the market almost two years.

Q. Did you think that was going to increase your problems of getting the line sold?

A. It's harder to reinstate a line in a market than it is to come in fresh. That's my opinion, of course.

Q. And since Morton had been out of the market since about 1958 or '9, you felt there was going to be some problem of getting it again known in the market?

A. It would take a lot of work.

Q. And that accounted at least for part of your reluctance to take on the line?

A. Yes.

Q. And Mr. Halvorsen, as I understand it, came up here to Salt Lake, and you had a meeting at the Continental Bakery?

A. That's right.

Q. And I take it he must have talked you into taking on the line, because I take it the result was that he recommended to his headquarters—

The Court: Now, now, now. I want you to observe that we're allowing a great liberality in leading the witness.

Mr. Schafer: We're going pretty fast, your Honor. I'll withdraw so much of that question as was asked.

The Court: The last question is stricken, and the witness's answers. After all, there's a certain amount of seriousness, I take it, to some of these questions.

Mr. Schafer: They're all serious, your honor.

The Court: All right. Then they're critical, I suppose.

[fol. 153] Mr. Schafer: They're all critical.

The Court: Then, don't lead.

By Mr. Schafer:

Q. During the time, Mr. Chapman, that you were a broker for the Morton Company starting in October 2 of 1960, and through 1961, did you limit your selling activities to the fruit pies?

A. I tried to sell every item.

Q. You testified that when you started, you started with a price on apple pies, I believe. Is that correct?

A. I think we had an advertising billback on apple, cherry, and boysenberry.

Q. And by—well, I think that's in the record. Why do you, Mr. Chapman, offer billbacks, as you call them, or advertising allowances?

A. You offer billbacks to get advertising support.

Q. Why is advertising support important to Morton?

A. Because without it you can't move anything in volume.

Q. And how do you get advertising support from the retail stores...

A. You either get it by paying for advertising or by having a low price.

Q. You mean either way or the other you get it?

A. That's right.

Q. Why is a low price important, Mr. Chapman?

A. A low price is important—

The Court: This sounds kind of elementary to me. It's something I should imagine we can almost take judicial notice of. Why is a low price important? The fellow wants the business.

Mr. Schafer: There are two levels to the business. They're wholesale—

The Court: Don't argue it to me.

Mr. Schafer: I wasn't going to argue.

The Court: Well, don't emphasize the evidence. Go ahead with your question.

By Mr. Schafer:

Q. Is a retail price, Mr. Chapman, important in the business?

A. Very much.

Q. Does Morton or any other manufacturer set the retail price?

A. No.

[fol. 154] Q. Will retail stores support any manufacturer's product by advertising without a good retail price?

A. No.

Q. How much advertising do you have to do if you are a retail store in order to get the advertising allowance promotion payment that's offered by a manufacturer in the industry?

The Court: It depends on the manufacturer, doesn't it?

The Witness: Yes, it would. The contract offered.

By Mr. Schafer:

Q. Excuse me. I was not thinking, Mr. Chapman, of a contract offering. I was thinking of what I understood your testimony to be with relation to billback or advertising allowance payments offered for two or three spot periods by the manufacturers in the industry.

A. We offered that for one ad during the period.

Q. In other words, if your store puts in one ad during the period involved, it gets an advertising allowance, whatever is offered to the trade generally, it gets that advertising allowance on all of the purchases made during that period?

A. Well, it would be based upon a group of stores, father than one individual store.

Q. A group of stores places an ad in the paper?

A. Right.

Q. And it gets the advertising allowance that's being offered on all of its purchases during that period?

A. That's right.

Q. It doesn't matter how much the advertising cost to the store?

A. That's correct.

Q. Do all of the manufacturers so far as you know, Mr. Chapman, operate in that fashion? A. No. Some do, and same don't.

Q. Some of the manufacturers—can you identify some of the manufacturers that offer these advertising allowance payments?

A. I believe that Carnation has had some, possibly Pet, quite a number of the various companies I believe have had the type of advertising billbacks.

Q. Is Mary Elizabeth one of your competitors in this market?

A. I think they've had advertising billbacks, yes.

Q. How about some other? Pictsweet or—

The Court: Now, now, now, don't lead him any further.

[fol. 155] By Mr. Schafer:

Q. Can you identify, Mr. Chapman, who the competitors are in the market?

A. Who at present are competing for business in this area?

Q. I'm speaking of 1960, '61.

A. 1960, '61? Utah Pie Company, I believe Ocoma, Bradley, Pet-Ritz, Morton, Pet-Ritz under the Swiss Miss label,

Chet's, I believe Swanson were in there at that time, Frigid-Dough, Blue Star, Pictsweet.

Q. Now, give us, Mr. Chapman, as many as you can conveniently give us, the number of those that offer these advertising allowance payments in the market.

A. I really don't know how many did. I'm reasonably sure that Carnation and Pet and Morton, and I neglected to mention Johnston Pie Company. I believe they did. I don't know how many others.

Q. Do you as a broker, Mr. Chapman, prefer to have a billback or advertising allowance offered to—to offer to the trade, or do you prefer to have a price cut offer to the trade?

Mr. Alioto: If your Honor please, there is no relevancy to the subject matter.

Mr. Schafer: He's an expert on it.

The Court: Sustained.

By Mr. Schafer:

Q. Is there any advantage, Mr. Chapman, in the Salt Lake market of a price cut over a billback or advertising allowance?

A. There is a decided advantage.

Q. What is the advantage of a price cut over an advertising allowance?

A. In this state we have what is called the six per cent law, and that means that the wholesaler has to make three-quarters of one per cent, and the retailer has to make six per cent above the laid-in costs to arrive at the retail selling price.

Q. Why can't he do that with a billback?

A. Because he has to take the invoice cost for a billback.

Q. And the advertising allowance does not show on the invoice?

A. That's correct.

The Court: I call your attention to the fact that that was a leading question. I told you not to lead him any more.

[fol. 156] By Mr. Schafer:

Q. Can you describe, Mr. Chapman, for the jury what kind of advertisements the retail stores place in order to get these advertising allowance payments?

A. Oh, they might be a very small ad, or they might be very large, quite a variation there.

Q. Where do they appear?

A. They appear in their normal food page ad in the Thursday Newspaper.

Q. In the Thursday newspaper?

A. Yes.

Q. You testified to Mr. Alioto that your first advertising allowance, or any sort of price concession, was 42 cents a case on apple pies, that that occurred right away, late in October of 1960. My question to you, sir, is whether or not you tried any other prices between that time and the time in June when you offered the price of 2.85 in the Salt Lake market.

A. Yes. We had a number of billbacks during the year.

Q. Can you recall how many?

A. Three or four.

Q. Can you tell the jury how much success you had with those billbacks?

A. I had very little success. I sold some product to American Food Stores in Ogden, Associated Food Stores in Pocatello, and I sold a few pies to Idaho Creameries in Idaho Falls. I had a very limited success.

Q. How much did you sell in Salt Lake?

A. None.

Q. With any of those offers?

A. No. I never sold a case for eight months.

Q. Do you have a judgment, Mr. Chapman, as to why you didn't sell any Morton pies during that eight-month period in the Salt Lake market?

Mr. Alioto: If your Honor please, this calls for an opinion and conclusion of the witness, and the witness is not qualified to answer.

The Court: Sustained.

By Mr. Schafer:

Q. How long have you been selling and buying pies in the frozen food industry, Mr. Chapman?

A. That is a hard question to remember the exact time.

Q. Give us the approximate time.

A. You mean that I have been buying and selling—buying fruit pies?

Q. How long have you been dealing with the frozen food industry in the Salt Lake market?

A. With the frozen food industry, I think the latter part of 1948.

[fol. 157] Q. And during that time you have been buying and selling frozen fruit pies—I'm sorry. I will retract that question, because I know it can't be right, because frozen fruit pies weren't available at that time.

A. That is correct.

Q. Frozen fruit pies, as I understand it, came into the market around 1955, is that correct?

A. I think that is correct.

Q. Have you been buying and selling frozen fruit pies since 1955?

A. Yes.

Mr. Schafer: I suppose, your Honor, that qualifies the witness as an expert as to why he can't sell or doesn't want to buy frozen fruit pies.

The Court: Sustained.

Mr. Schafer: Your Honor means that you are still sustaining the objection?

The Court: That is what I mean.

By Mr. Schafer:

Q. You have said, Mr. Chapman, that you felt there was a competitive advantage to having temporary price discounts showing on the face of the invoice rather than having billback which didn't show on the face of the invoice.

A. That's right.

Q. My question to you is whether or not you communicated this suggestion to Mr. Halvorsen of the Morton Company?

A. I did.

Q. I take it by your testimony—I want to be sure not to lead you— Did Mr. Halvorsen accept your recommendation, or did he exercise his own judgment as to how you were going to make your various concessions in the market?

A. He exercised some of his own judgment. We pretty well worked together on the thing.

Q. Did you testify that the first five or six price concessions that you tried in the market were billbacks?

A. That's right.

Q. I take it you were recommending price discounts which would show on the face of the invoice?

A. That's right.

Q. I take it by reason of the fact that they were not such, but were billbacks, that Mr. Halvorsen rejected your advice?

A. That is correct.

[fol. 158] The Court: Does that sound to you like a leading question?

Mr. Schafer: I thought it was a conclusion.

The Court: Will you read it back to him.

Mr. Schafer: I will withdraw it. I really don't care.

By Mr. Schafer:

Q. During this period of time, Mr. Chapman—let me ask you one question I forgot to ask you. Does it matter to the manufacturer, in terms of whether or not he pays for advertising performance in the one ad that the retailer has to place—does it matter to him how big the ad is?

A. No.

Mr. Alioto: Does it matter to which manufacturer?

Mr. Schafer: Make it Morton.

By Mr. Schafer:

Q. Does it matter to Morton how big the ad is that appears in the Thursday newspaper food section?

A. No, it can be a very small ad.

Q. During this period of time that you have testified you were trying to get new business on fruit pies, from October, 1960 to June of 1961, were you trying to get new business on any other products?

A. Any other Morton products?

Q. Any other Morton products, I am sorry.

A. I was trying to get business on the full line.

Q. Did you make various price concessions during that period of time on the other products in the Morton line?

A. Yes.

Q. These are products, I take it, that the Utah Pie Company does not manufacture?

A. They were all meat pies.

Q. Would you describe for us, Mr. Chapman, what Frozen Food Marketers is?

A. Frozen Food Marketers is the name of a small company that I have. I employ one salesman. We have a small office located in my home. We act as a broker, or a commission agent, for a number of frozen food packers. We sell products, frozen food products, in Utah and Idaho, and we are paid only on what we sell. We have no guarantee of any kind.

Q. Do you represent only the Morton line?

A. No. I represent five or six lines.

Q. Could you describe for us briefly what those lines are, what the names of the manufacturers are?

[fol. 159] Mr. Alioto: We submit it is not relevant to any issue in this lawsuit.

Mr. Schafer: It is relevant to the issue of the question of the independent contractor, the independent brokerage.

Mr. Alioto: I will withdraw the objection, if that is what we are talking about.

By Mr. Schafer:

Q. Without taking up too much time, just describe who the manufacturers are you represent.

A. Do you want the ones I represent as of right now?
Q. Yes.

Mr. Alioto: That is not relevant, that he represents right now.

By Mr. Schafer:

Q. The ones you represented in June of 1961.
A. I represented Minute Maid Corporation, on citrus juices; Chesshers, chickens, frozen chickens; Morton Frozen Foods, prepared foods and baked goods; Fullham Brothers, a line of frozen fish; Mr. Smith's Frozen Meat, which is what it says, frozen meat.
Q. Now, you have testified—again back to fruit pies, you testified that you tried various price concessions up to the period of June, 1961 and that then you recommended to Morton that they decrease the price to $1.15.
A. Right.
Q. And how long a period—your answer was yes?
A. Yes. I am sorry.
Q. How, Mr. Chapman, did you fix on the figure 2.85 as the effective delivered price in Salt Lake City as your recommendation to Morton?
A. We were interested in getting some business from Safeway or from any other big buyer in the area. We had thought of meeting the Swiss Miss pie price in Safeway, but after discussing that, we decided that wasn't good enough, because they could buy that priced pie every day of the week, and our price reduction would only be for a very short period. And, besides that, they were buying their Pet-Ritz, pies, or, I should say, Bel Air pies, packed by Pet-Ritz, and they were combining loads. So for me to go in there and offer them the same price would not get us any business.
We thought about Associated, and we figured out that on an ounce-per-ounce basis, that 2.85 was the same comparable price on a 22-ounce pie as a 3.10 was on a 24 ounce.
[fol. 160] Q. Why do you say 2.85 on a 22 ounce is comparable to 3.10 on a 24 ounce?

A. It was based on an ounce-per-ounce basis.

Q. When you based it on that, what do you come out with?

A. Well, you come out with an exact same equivalent.

Q. You mean that each ounce costs just as much in each pie?

A. Well, I assume so.

Mr. Alioto: If your Honor please, I make a motion to strike the assumption, because the assumption, I think anybody knows, is wrong, that an ounce costs the same in each pie.

Mr. Schafer: We will do it by arithmetic.

Mr. Alioto: If you can prove that, you are good.

The Court: The answer is stricken.

By Mr. Schafer:

Q. You said, Mr. Chapman, that the frozen fruit pie manufactured by the Utah Pie Company sold at 3.10, is that correct?

A. That is right.

Q. Now, I take it, in order to determine what the ounce cost, or price, of that product was, you would have to take the 24 ounces and multiply it by 12 to get the number of ounces in a dozen, is that correct?

• • • • • • •

[fol. 161] Mr. Schafer: I am just talking about the price, the price quoted on an ounce basis by the Utah Pie Company on Frost 'N' Flame.

By Mr. Schafer:

Q. So you have to take the 24 ounces that are in a pie and you have to multiply it by 12, I take it, to make up a dozen?

A. That's right.

Q. You do that—I will try to get this correct—you get 288 ounces in one dozen pies. And you have testified that the Utah Pie Frost 'N' Flame pie was selling at $3.10, right?

A. That's right.

Q. So if you divide 2.88 into 3.10, you would get the ounce price charged by the Utah Pie Company?

A. That's right.

Q. I will now do that. That comes out, according to my calculation, at just about 1.08 cents per ounce.

Now, if we go through the same computation with respect to a 22 ounce pie, is it correct, Mr. Chapman, that you have 264 ounces in a 22-ounce pie, in a dozen of them?

A. That's right.

Q. And you said you recommended to Morton that they offer their 22-ounce pie at a price of 2.85 a dozen?

A. That's right.

Q. If you divide 264, then, into 285, you would get the ounce price per dozen, is that correct?

A. That's correct.

Q. Check me if I am wrong on this, Mr. Chapman, because this is your testimony.

The Court: I am afraid that will not make it so.

By Mr. Schafer:

Q. Now, Mr. Chapman, would you testify for me, please, as to what the ounce price charged by the Utah Pie Company was in June of 1961?

A. It is 1.08.

Q. What was the ounce price that you recommended Morton sell its 22-ounce pie at in June of 1961?

A. 1.08.

Q. Thank you. 1.08 cents, I think you mean?

A. Yes.

Q. You testified, sir, that in reaching your conclusion as to a recommendation to Morton of trying a 2.85 price in the market that you thought of the AG Stores, Associated Frozen Foods. My question to you, sir, is: Why did you think of the AG Frozen Food Stores after you thought of the Safeway Stores?

A. Well, I thought of all of them, as far as that goes. I thought we might stand a chance of getting some business

out of Associated, I didn't know. I was extremely doubtful [fol. 162] if we would get any business out of Associated, because I was only coming in and offering them the same identical price that they were paying every day, and my offer was strictly a spot offer for a two-to-three week period.

Q. In order for Associated, Mr. Chapman, to buy the pies at a price of 2.85, how many did they have to buy?

A. Twenty-four hundred cases.

Q. And what happens when AG Stores get 2400 cases all at once?

A. Well, they have a storage problem, of course, and they have money tied up in it.

Q. Am I correct, Mr. Chapman, that when you were a buyer—I am sorry, that will be leading.

As a buyer, Mr. Chapman, did you have any preference for ordering in small quantities as against large quantities?

A. Yes. That was quite an advantage to us to be able to order small quantities, because at the time we had a very, very limited warehouse, and the company didn't like to tie up any money in inventory.

Q. And in order to get the best price of the Utah Pie Company, the $3 price, when you were a buyer, did you have to buy in truck load quantities?

A. No. You could buy in any quantity from 15, 20 cases up.

Q. In addition, then, to the natural competitive advantage that Mr. Alioto identified as being derived from the location of the Utah Pie Company, would you identify the availability of the smaller shipments as a competitive advantage of the Utah Pie Company over its competitors?

A. They have a decided advantage over us. They can deliver the next morning after an order is placed that afternoon. It takes us a minimum of three or four days.

Q. Does this have significance competitively in the market place?

A. Sure, a great deal. Anybody can buy in limited amounts down there. We have to sell in trucks, half trucks, or quarter trucks. If we run out of pies, we can drop down

on Utah Pie and pick up a few pies. You can't do that with Morton. You can't go to Watsonville and pick up a few pies.

Q. When you were a buyer, Mr. Chapman, were you willing to advertise a manufacturer's pie if you couldn't advertise it at a retail price competitive with your competition?

A. We would never advertise a pie unless we were at least competitive or lower.

Q. As a broker now, do you find it necessary to offer, Mr. Chapman, a price to all the buyers in the market which would permit those buyers to quote a price as favorable at retail level as the lowest price of their competitors?

[fol. 163] A. That is correct.

Q. Their retail competitors?

A. That's correct.

Q. You have testified you made a sale—or, I should say, I guess, two sales, to Safeway of about 3,000 dozens each, is that correct? I'm sorry, with this 2.85 price.

A. I made two sales of 7500 cases each.

Q. Seventy-five hundred cases. Is it your recollection, sir, that the first order—I take it there were two orders. I think you testified there were two orders.

A. That is right.

Q. Is it your recollection that the first order that Safeway purchased was delivered by Morton?

A. The first order was delivered by a commercial carrier.

Q. At Morton's expense?

A. At Morton's expense, that's right.

Q. So Safeway took those pies at a 2.85 price?

A. That is correct.

Q. And they were apple pies?

A. That is right.

Q. And some coconut pies, I think you said?

A. That's right.

Q. I think you testified, to Mr. Alioto's question, that that first delivery occurred on about June 20—I may have that statement wrong; correct me—June 20, June 29, or something. Is that the right date?

A. It could have been. It was the latter part of June.

Q. And you offered the price to Safeway, I take it, on June 16?

A. That's right.

Q. Did that indicate that Safeway didn't take your offer, or didn't buy your offer right away?

A. It bought the offer that day.

Q. Why did it take so long to deliver it?

A. The order was cancelled.

Q. Who was the order cancelled by?

A. It was cancelled by Mr. Halvorsen.

Q. Why was the order cancelled? Didn't he want to sell 750 cases to Safeway?

A. Well, I got the order from Safeway just before noon on a Friday, and the stipulation on the order was that I could have the order if I could make delivery of two truckloads of pies to Safeway's warehouse in Salt Lake by 4:00 a.m. the following Monday.

I contacted Mr. Halvorsen to see if he could make the necessary arrangements to have that done. He later called me back, and we were able to work that out and make the necessary arrangements for two trucks. I confirmed that with Mr. Henzke that the two truckloads of fruit pies would be delivered at 4:00 a.m. the following Monday.

[fol. 164] That afternoon when I called at my home, my wife reported that Mr. Mike Walsh from Safeway had been trying to get in touch with me. I contacted Mr. Walsh, and he said that after I had left with the order on the fruit pies that some of my competition had come in there and offered them a lower price on apple pies. It amounted to 5 cents a case. And he was wondering if I could do anything about it, if there was anything that I could do to get the same price on my fruit pies.

This was, I guess, 4:30, quarter to five in the evening.

I had no authority whatsoever to give anybody a price. So I called Mr. Halvorsen. I finally got hold of his secretary and she got hold of Mr. Halvorsen, and I talked to him. In fact, I got him out of a barber chair in a barber

shop. And I explained my problem, that we had this problem with Safeway, and apparently they would like an additional discount off the price, of a nickel a case.

Mr. Halvorsen made quite a remark to me. He said, "Hell, this is a fine time to show up with a problem like this." He says, "It's Friday evening." He says, "It is after five o'clock. The main office is closed and the trucks are being loaded. Now what do we do?"

I told him that I didn't know what we should do. So we discussed the thing. We didn't know what—really what to do about it. We didn't want to ship them, and yet we didn't want to lose the business, because we had never had any business with Safeway before.

So he said, "Well, you call Walsh again and see what you can work out with him and then you contact me a little later."

And in the meantime I had received an order from the American Food Stores, a Mr. Elmer Degenhardt. So I called Mr. Degenhardt and I told him that I understood that competition was offering a lower price than he had bought pies for from me, that we had this order on file in Watsonville and if he so desired I would be happy to cancel it.

He informed me that he knew that there was a lower price in the market, but that he had given me the order and that he expected me to deliver the merchandise.

[fol. 165] In the ensuing time I finally contacted Halvorsen again. We decided that neither one of us could make a decision on prices, and we were afraid that Safeway couldn't live with this situation, so he had the trucks unloaded and the merchandise put back in the storage.

And I called Mr. Walsh at his home and I told him, I said, "I am sorry, we couldn't do anything about this and we decided to unload the trucks and put the merchandise back."

And he suggested that I call Mr. Henzke, which I subsequently did, and he said he was extremely sorry that we had cancelled the orders, that he didn't mean it quite that

way; however, that it probably was a good thing because he had a large inventory on Swiss Miss and he would advertise those the coming weekend. And he suggested that I come back to see him the next week and we would discuss the Morton problem again.

Q. Did you subsequently go back to see Mr. Henzke and discuss the Morton problem, sir?

A. I went back and talked to both he and Mr. Walsh on a Tuesday. And he gave me another order of 7,500 cases of pies to be delivered into Salt Lake.

Q. And those are the pies that were delivered on a common carrier paid for by Morton?

A. That's correct.

Q. And then, a subsequent order was received from Safeway; is that correct?

A. Yes. I received another order for a like amount.

Q. And on what basis was that order?

A. That was f.o.b. Watsonville.

Q. Mr. Alioto asked you, sir, whether or not that order was picked up in Safeway's trucks, and I wondered if you knew if it was or not.

A. I think it was picked up by Dunkley Distributing.

Q. By a common carrier?

A. By a carrier that was doing business with Safeway, yes.

Q. And Safeway paid Dunkley; is that correct?

A. Safeway paid them, yes.

Q. So far as you know?

A. Yes.

Mr. Alioto: Counsel said "common carrier."

The Court: Well, "so far as you know" means you don't know, doesn't it?

The Witness: I'm sorry. How did I answer?

[fol. 166] The Court: You said, "So far as I know." I never know what that means.

Mr. Schafer: That means I don't want him to answer, your Honor—

The Court: Well, now, never mind. I'm talking to the witness now. When you said, "So far as I know," did you

mean to say you didn't know, or did you mean to say you did know?

The Witness: That two truckloads of pies were picked up by Dunkley.

By Mr. Schafer:

Q. Do you know who paid Dunkley to transport them?

A. Safeway paid the freight.

Q. How long, Mr. Chapman—let me start over by saying—do you know, Mr. Chapman how long 7,500 cases of apple pies lasted Safeway?

A. Well, I'd say pretty close to three weeks. I think that 15,000 cases lasted roughly five to six weeks.

Q. So that these two sales that you made to Safeway so far as you know lasted Safeway six weeks?

A. That's right.

Q. And your testimony was, if I understood it correctly, that Safeway in order to accept your pies had to clear its warehouse of Swiss Miss pies?

A. That's correct.

The Court: Now, this is repeating the testimony.

Mr. Schafer: I'm sorry.

The Court: It's been made very plain.

Mr. Schafer: I wasn't sure I understood him.

By Mr. Schafer:

Q. Do you know, Mr. Chapman, who authorized your $2.85 price in June of 1961?

A. Mr. Halvorsen.

Q. Do you know from whom he received his authorization?

A. I assume from the main office in New York.

Q. Do you have any reason to believe that Mr. Vail had anything to do with it?

A. I don't think so.

Q. Mr. Alioto, sir, identified your offers to these various customers of the $2.85 price in Salt Lake City as negotia-

tions; and my question to you is whether or not you meant by accepting, impliedly accepting his characterization, that there was any negotiation involved on this offer to these various stores or distributors.

A. It was merely an offer.

[fol. 167] Q. Explain to us, if you would, please, what "merely an offer" means. How do you operate as a salesman with merely an offer?

Mr. Alioto: Ask him what was said or done in connection with anything.

Mr. Schafer: I'm trying to ask him what he meant by "merely an offer."

The Witness: I go into the buyer. Take for instance Safeway. And I have a *presentation*. I have their form, and I pull it out showing the exact price that we are offering, the freight allowance, if there is one, f.o.b. the Watsonville plant, in this particular instance; and that's about all there is to it.

By Mr. Schafer:

Q. Is there any negotiation involved?

A. Well, I don't know what you mean by "negotiation."

Q. Is there anything more involved, Mr. Chapman, than a straight offer?

The Court: Don't lead him.

Mr. Schafer: I don't think this is leading.

The Court: It started out like it was going to be. I don't want you to lead him.

Mr. Schafer: This is a yes or no question.

Mr. Alioto: That's the definition of a leading question sometimes.

Mr. Schafer: I really don't want to lead him. I'm trying to comply. I don't think this is leading.

The Court: I know you have some difficulty asking those questions, and I'm not going to be too hard on you, unless you keep doing it. How much more examination do you have of this witness?

Mr. Schafer: I would say probably three-quarters of an hour.

The Court: All right.

• • • • • • •

[fol. 168] Q. Mr. Chapman, when we closed yesterday I was about to discuss with you the concept Mr. Alioto inquired about as to the lowering of the market, as I recall it, in June of 1961, in the Salt Lake market. You got two orders from one customer, and your offer was lasting for about two or three weeks, according to the record.

Now, if such an order, Mr. Chapman, would cause a lowering of the market, did you mean to say it would be a general lowering of the market?

A. No. It would be strictly for just a temporary period, two-to-three-to-four-week period, whatever it would take to move the pies out.

Q. When you offer, or when any competitor offers, a two-or-three-week promotional allowance, do the other competitors reduce their price always?

A. Not necessarily. Sometimes they might meet the situation for just a week or two, and then other times they would just let it go by.

Q. Those that do reduce their price do not reduce their price on a permanent basis, is that correct?

A. Strictly temporary.

Q. As to the June, 1961 period, Mr. Chapman, was there a lowering of the retail price in the market, the retail advertised price, if you will?

A. Yes, there was a lowering of the retail advertised price. On the same week that our pies—I am referring to Morton pies—were advertised at three for 79 cents, the Frost 'N' Flame, the Utah pie, was advertised, that is, Associated Foods, four for a dollar.

Q. The same week, you said?

A. The same week, yes, sir.

Q. That would be the same Thursday, is that correct?

A. Yes.

Q. Do you know whether or not, Mr. Chapman, in June of 1961 the Utah Pie Company lowered its price generally when you reduced your price to $2.85?

A. Yes, they did.

• • • • • • • • •

[fol. 169] Q. I refer you again, Mr. Chapman, to Exhibit 4, which you saw yesterday. Customer No. 5, Mr. Chapman, I will inform you, is the Utah Wholesale Company. Can you look at Exhibit 4 and tell the jury when the last price was quoted to Utah Wholesale by the Utah Pie Company of $2.75.

• • • • • • • • •

By Mr. Schafer:

Q. What was the last price you see quoted to Utah Wholesale, Mr. Chapman, of $2.75 on the apple pie, Utah Pie brand?

A. The last date was August 5.

Q. What is the first date on which the Utah Pie Company sold Utah Wholesale its Utah Pie brand at 3.50?

A. August 11.

Q. So that whatever lowering of price by the Utah Pie Company to Utah Wholesale was over by August 11 of 1961?

A. Yes.

Q. Looking at Customer No. 2, Mr. Chapman, when is the last price quotation you find under Customer No. 2, which is Associated Frozen Foods, of the $2.75 price?

A. August 31.

Q. What was the first price at which the Utah Pie Company increased its price to Associated Frozen Foods to $3.60?

A. September 13.

Q. Thank you. Again in relation, Mr. Chapman, to this concept of lowering this price—you have been in this market for a good many years—did any one particular company lower the price consistently through these years?

A. Yes.

Q. Was any one particular company consistent in the low price manufacture in this market?

A. Yes.

Q. What company was that?

A. The Utah Pie Company.

Q. When did they start lowering their price, if you can recall?

A. I believe in 1958 or the forepart of '59.

Q. Is it your testimony they were lower than the general level of competitive activity in 1958?

A. Yes.

Q. Do you know of any competitive activity which would cause them to lower their price?

[fol. 170] Mr. Alioto: I submit, if your Honor please, it calls for the opinion and conclusion of the witness on factual matters that can otherwise be reached.

The Court: Sustained.

By Mr. Schafer:

Q. Putting aside, Mr. Chapman, the temporary two-or-three-week promotional allowances offered by the competitors in this market, has any competitor in this market offered as low a price as Utah Pie Company?

Mr. Alioto: I submit, if your Honor please, that is a matter of record.

The Court: Sustained.

Mr. Alioto: This man has no way of knowing that.

The Court: Sustained.

Mr. Schafer: He has been in the market a good many years.

By Mr. Schafer:

Q. We talked yesterday, Mr. Chapman, about the Frost 'N' Flame brand. I want to make sure we know what that is. Who produces the Frost 'N' Flame brand?

A. Utah Pie Company.

Q. As I understand it, the Frost 'N' Flame brand was purchased by the Associated Frozen Foods.

A. That is correct.

Q. And you were the buyer for Associated Frozen Foods at the time it was first purchased.

A. That's correct.

Q. Do you recall when the Frost 'N' Flame brand was offered to you as buyer for Associated Frozen Foods?

A. February, I believe, in 1960.

Q. Who suggested that arrangement, Mr. Chapman?

A. Mr. Rigby.

Q. You did not ask him for this brand?

A. No, sir.

Q. What price did he quote to you, do you recall?

A. Three dollars on apple pies. Three dollars a dozen.

Q. What was the general prevailing price, if you know, that you were buying at at that time, February of 1960?

A. I think about sixty cents a dozen more money.

Q. You were buying from the Utah Pie Company at sixty cents more?

A. Yes.

Q. Then you were buying from other competitors? How much more?

[fol. 171] A. I think between fifty and sixty cents a dozen. Somewhere. I'm not positive.

Q. Did the Utah Pie Company make any representation as to the size and the quality of the Frost 'N' Flame brand?

A. The size was to be a 24-ounce pie, and the quality was to be the exact same quality as the Utah label.

Q. Was it your understanding that you were buying the same pie at $3.00 that you were formerly buying at $3.60, but under another name?

A. Yes, sir.

Q. Did you have an exclusive arrangement on the Frost 'N' Flame brand?

A. Yes. There was our label to use and the area that our company served.

Q. No other customer?

A. No other customer had access to that label in that area.

Q. Could any other supplier compete with the Utah Pie Company for the business represented by the Frost 'N' Flame?

Mr. Alioto: Your Honor please, I submit it calls for the opinion and conclusion of the witness.

The Court: Sustained.

By Mr. Schafer:

Q. Did the Utah Pie Company own the Frost 'N' Flame name, Mr. Chapman?

A. Yes, it did.

Q. Mr. Chapman, when you were a buyer with Associated Frozen Foods, would you have been willing to switch the business from the Frost 'N' Flame name, the business of Associated Frozen Foods, from the Frost 'N' Flame to another brand name without a substantial price difference?

A. No, because we not only had an excellent price; we had a low price, and it was an everyday price, and we had also advertised it, and we had an investment in the label.

Q. Can you tell the jury what you mean, sir, by an investment in the label?

A. Well, let's say that we had promoted the Frost 'N' Flame pie in advertising, advertising in the newspapers, over radio, and that type of medium. In other words, we had developed a franchise for that name.

Q. Do I understand you to testify that you had invested advertising money in the Frost 'N' Flame name?

A. Yes.

Q. When you were now a buyer, Mr. Chapman, with Associated, can you recall that you had ever received an offer of $3.00 for a dozen apple pies from any other supplier of frozen fruit pies?

A. No.

[fol. 172] Q. Had you ever heard of anybody else being offered such a low price?

A. No.

Q. Again thinking of yourself as a buyer, Mr. Chapman, would you have been induced to switch your Associated business from the Frost 'N' Flame name to the Morton name on the basis of a temporary two or three week price promotion allowance?

A. No, I would have had—have had a much better price and a guaranteed price for a considerable length of time.

Q. Did the price that you received, the $3.00 price that you received, from the Utah Pie Company give your retailer members a substantial competitive advantage?

A. Yes, it did. It gave us an advantage, in that we could make considerably more profit by handling the Frost 'N' Flame label, and it gave us a considerable advantage, because we could advertise it at a greatly reduced cost.

Q. Were you able to advertise it at retail at a price lower than anybody else's brand was being advertised at retail—

A. Yes.

Q. —if you wanted to?

A. Yes.

Q. In terms of the nature of the Associated organization, Mr. Chapman, was it possible for other retail stores if they chose to to buy the Frost 'N' Flame brand even if they weren't members?

A. Yes. It was available.

Q. You testified, Mr. Chapman, yesterday to Mr. Alioto that you, in respect of this $2.85 price in June of 1961, that you identified that price, if my notes are correct, as a very, very good price.

A. Yes. I used that as a—

Q. I haven't asked a question yet, sir. Please let Mr. Alioto have a chance to object. My question to you, sir, is what did you mean by that testimony?

A. Well, it was a salesman's pitch, as you might say, to indicate to the customer that it was certainly a great deal better offering than I had been coming around with.

Q. Did you think you had a competitive price?

A. Yes.

Q. You testified yesterday, Mr. Chapman, that you had a better list price here than in California? Morton had a

better list price—I'm sorry—in California than it had in Salt Lake City at the time of June, 1961. And my question to you is whether or not, Mr. Chapman, the list price which you were shown yesterday reflects—always reflects—the offering price of the Morton Company so far as you know?

A. No, it reflects no offering. It's strictly a list price.

Q. What other documents would be available to reflect an offer made by the Morton Company to the trade?

[fol. 173] A. Well, normally a supplement or broker's bulletin.

Q. Do you get, Mr. Chapman, in the ordinary course of your business these supplements for the California prices and the brokerage bulletins?

A. No, sir. I only get the one from my area.

Q. In June of 1961, Mr. Chapman, would you have had any way of knowing what the price was that Morton was offering his pies at in San Francisco or Los Angeles?

A. No, I did not.

Q. You testified, sir, if I recall correctly, that the purchases of the two orders of Safeway in June of 1961 last Safeway about four—I think, five or six weeks, you say?

A. Yes.

Q. And my question to you, sir, is how do you know that?

A. Well, because the advertising during the period, and they were just about out at the end of that time.

Q. Do you recall how many advertisements there were of your brand in that period?

A. I believe there were four.

Q. Do you recall, sir, whether or not the advertisements of your brand were reduced in price to meet the price at retail that the Utah Pie Company brand was being offered at? In other words, you said it was four for a dollar?

A. Yes. Safeway started out. Their first ad was three for 79 cents, and I believe their next three ads were four for a dollar.

Q. The second Safeway ad would have been at four for a dollar; is that right?

A. Yes.

Q. And that was after the first Utah Pie brand ad at four for a dollar?

A. Yes.

Q. One week after? Is that correct? Mr. Chapman, did you expect when in offering your $2.85 price that you would force the Utah Pie Company down to a lower price for its heavier pie?

A. No.

Q. Can you tell the jury and the Judge, Mr. Chapman, why you did not think that that would have that effect?

A. Well, because it was strictly a spot offering; it was only good for just a few weeks. And besides that, the Utah Pie Company pack a 24-ounce, and I didn't see any need for them to reduce their price.

Q. You identified, Mr. Chapman, a Mr. Sid Boone yesterday in Mr. Alioto's examination. My question is simply, would you identify for the record who Mr. Sid Boone is?

A. I believe his title was the merchandise buyer for the Grand Central Markets.

Q. And you testified, I think, am I correct in recalling, that it was Mr. Sid Boone who indicated to you that the Grand Central was negotiating for another private label pie?

A. That's correct.

[fol. 174] Q. And it was he that indicated the price would be a price competitive with the Frost 'N' Flame brand?

A. He indicated it would be cheaper.

Q. Both of those pies are produced by the Utah Pie Company?

A. That's correct.

Q. Can you identify for us, Mr. Chapman, who—as I understand your testimony yesterday, you identified about four customers who account for about ninety per cent or so of the business here in the market. I wonder if you can identify for us who the customers are who make up the other ten per cent of the market.

A. They would be Booth Fisheries, Chase's Ice Cream, Northern Sales, and I believe Great Western Distributing. Small distributors.

Q. Do you offer to sell or try to sell to those distributors, Mr. Chapman?

A. No, I do not, because the smallest amount of product that I can sell is a quarter of a truckload, and they're just not sufficiently in the business to handle that many cases.

Q. So that in June of 1961 when you were offering your $2.85 pies in this market, you did not, as I understand it, you did not make that offer to the smaller distributors; is that correct?

A. That's right.

Q. Because they were not your customers?

(Witness nods head.)

• • • • • • •

By Mr. Schafer:

Q. The Utah Pie Company's Frost 'N' Flame brand was the lowest priced pie on the market; is that correct?

A. Yes.

Q. In your judgment at that time, Mr. Chapman, could the Morton Company have sold its pies at a price higher than $3.00?

A. No.

Q. In your judgment, Mr. Chapman, could the Morton Company have sold its pies at a price higher than $3.10 in 1961?

A. No.

Q. How was your business in 1962 on fruit pies?

A. Our business in 1962 has been extremely poor. My volume is about 30 per cent of my sales as against 1961.

Q. Can you account for that decrease in sales?

A. I don't have a price to meet the situation.

Q. What do you mean by "meet the situation"?

A. I don't have a price that I can sell to the buyers that will meet the Utah Pie Company price.

Q. What is the Utah Pie Company's price on its apple pies?

[fol. 175] A. $2.90 a dozen.

Q. Has it been that price all year long?

A. Yes, it has.

Q. Do you know of any reason—I take it, Mr. Chapman, that that's the lowest priced pie on the market?

A. That's my understanding, yes.

Q. From your knowledge of the market during 1962, Mr. Chapman, do you know of any reason why it was necessary for Utah Pie Company to price its pies that low?

A. No, I do not.

Q. Have you tried to meet that price with your Morton pies?

A. No.

Q. What have been, Mr. Chapman, the prices for the Morton apple pies during 1962?

A. We have had a couple of temporary price declines, and I believe that we did—I believe one of them was $3.00 a dozen delivered on apple pies.

Q. And how long did that last?

A. I believe either a two or three week period.

Q. Is it your testimony that outside of a two or three week period, your price has been what?

A. Back to our regular list. Four dollars.

Q. You testified that you have not tried to beat the Utah Pie brand's prices. I wonder why not? Can you tell us?

A. Well, if we met the Utah Pie Company's price of $2.90, on an ounce per ounce basis, our pie would be roughly about $2.64; and I felt that Morton Company would not go along with this thing, and I have never suggested it.

Q. You felt that they would not go along with a $2.64 price?

A. That's right.

Q. Do you have any reason for not having felt that way?

A. Well, I think if we had, possibly the Utah Pie Company would have come in at a lesser price.

Q. Why do you think they would have done that?

A. Well, because they did that on the previous—the time when we were in at $2.85.

Q. In your judgment, Mr. Chapman, would a $2.64 price be a better price than the Utah Pie Company's price at $2.90?

A. No, it wouldn't be the same comparable price.

Q. At a price of $2.64, Mr. Chapman, would that be available to a customer in any quantity?

A. No. Only in truckload lots.

Q. So far as you know, is the Utah Pie Company's $2.90 price available in any quantity to a customer?

A. In any quantity.

Q. From your experience as a buyer, Mr. Chapman, is that a substantial competitive advantage for the Utah Pie Company?

A. Yes. It enables the various small buyer to buy very limited amounts of merchandise at a low price.

[fol. 176] Q. You testified, Mr. Chapman, in connection with this Sid Boone colloquy that there were negotiations for a private label between the Utah Pie Company and Grand Central Stores? My question to you, did those negotiations ever come to fruition?

A. Yes, it did, and they began to handle the Mayfresh label.

Q. Could you, Mr. Chapman, in your own words explain to the jury what we mean by "private label"? We've been using that term, and I'm not sure we all understand it.

A. Well, "private label" is a label that's given exclusively to one distributor or one wholesaler. It's for his own use, and no one else can participate in the use of that label.

Q. And the Grand Central Stores started buying the Mayfresh label, I think you testified, from the Utah Pie Company. Does anybody else buy the Mayfresh label, Mr. Chapman?

A. The American Food Stores in Ogden. They are a—American Food Stores and the Grand Central Markets are

a division of Mayfair Food Stores. They're both the same chain.

Q. So that's why two different store names can buy one brand name?

A. That's correct.

Q. Now, the American Food Stores are purchasing the Mayfresh label?

A. That is right.

Q. Has that had any effect upon your business, Mr. Chapman, with American Food Stores?

A. Yes. I was kicked out.

Q. Did you ever, Mr. Chapman, in your days as a buyer, did you ever pay as much for a 22-ounce pie as you did for a 24-ounce pie?

A. Never.

Q. Why not?

A. Well, because a 22-ounce pie is just a smaller pie. It's just not economically sound to pay more for less.

Q. And is Morton a 22-ounce pie?

A. Yes, it is.

Q. And is Utah Pie a 24-ounce pie?

A. Yes, sir.

Q. And would you have been willing as a buyer to have purchased a Morton Pie at the same price as the Utah Pie Company price?

A. No.

Q. Did you ever in your days as a buyer, did you ever have a smaller pie over—were there smaller pies on the market than a 24-ounce?

A. Yes.

Q. When these pies were offered to you, these smaller pies, Mr. Chapman, how did you figure out whether or not the price was a good price or a bad price?

A. We compared it on an ounce per ounce basis.

• • • • • • •

[fol. 177] Q. You identified for Mr. Alioto the four major customers in 1961. How many of those four major customers in 1961, Mr. Chapman, did the Utah Pie Company have substantial business with?

A. I believe in two.

Q. Can you identify those two?

A. Associated Frozen Foods and Utah Wholesale.

Q. Now, looking at the situation in 1962, what is the picture in terms of the Utah Pie Company business with the four major customers in the market?

A. Well, they have a great amount of business now with Safeway and, of course, I was displaced at American Food Stores, so now they have a great amount of business in American Food Stores.

Q. Have they retained their position with Associated Frozen Foods?

A. Yes, they have.

Q. Have they retained their position with Utah Wholesale?

A. Yes.

Q. So that your testimony is that, so far as you know, they have a substantial position with those four major customers?

A. Yes.

Q. I wasn't sure yesterday, Mr. Chapman, that we made it clear what the difference is in this market between what we call the promotional allowance or billback or advertising allowance, between that situation and a temporary price cut or price reduction. Can you identify for us, Mr. Chapman, if there is any difference between those two situations, looking at it from the seller's side of the fence, if you will?

A. It is actually the same thing. It is to get people to advertise. It is a price decline, except that in this State we cannot use that. We have to have a price taken off of the invoice because of the selling law that we have in effect.

Q. So, if I understand you correctly, when a customer gets a promotional allowance, that does not show on the

face of the invoice, so that he has to charge 6 per cent above that invoice price, is that correct?

A. Correct.

[fol. 178] Q. And that invoice price is a higher invoice price than the situation where you have given a temporary price discount, is that correct?

A. That is right.

Q. And is that situation with respect to the Utah State law, is that the only situation creating a difference between the temporary price decline and the promotional allowances?

A. Yes.

Q. During the time, Mr. Chapman, the 14 months that you have been associated, through 1960 and 1961, with the Morton Company, as a broker, have you ever had to pay any spoilage claims?

A. No, sir.

Redirect examination.

By Mr. Alioto:

Q. Mr. Chapman, just a very few questions and we will conclude.

Counsel asked you about your prices and business in the year 1962. It is a fact, is it not, Mr. Chapman, that in the year following the filing of this complaint that your prices were generally higher than they were in the immediate period preceding the filing of this complaint?

A. Yes.

Q. And approximately how much higher were they after this complaint was filed?

A. Fifteen cents a dozen.

Q. Did you ever, in 1962, for example, have a 2.55 price?

A. No, sir.

Q. Did you have a 2.85 price in 1962?

A. No, sir.

Q. What is the highest price you had in 1962 for the very same pie you were selling at 2.55 before this complaint was filed?

A. Four dollars.

Q. Four dollars?

A. Yes.

Q. In other words, after the complaint was filed you had a $4 price here in Salt Lake City?

A. Yes, we had a $4 price off and on.

Mr. Schafer: Your Honor, may I state an objection to this line.

The Court: Surely. Go ahead.

Mr. Schafer: If the line of interrogation is intended to develop the point that the Morton Company has raised its prices because this complaint was filed, this witness is not competent to testify to that. He has no power to fix the prices of the Morton Company.

[fol. 179] Mr. Alioto: You raised the question about his 1962 prices. I didn't. So I am examining him about what he charged in 1962.

Mr. Schafer: It has no relation to the date of the complaint. He has no pricing power.

The Court: Objection overruled.

Mr. Schafer: He is asking for why Morton priced them as they did.

The Court: Overruled.

By Mr. Alioto:

Q. Do you have a man named Dick Horton who works for you?

A. Yes, sir, I do.

Q. Is he a salesman in your organization, Mr. Chapman?

A. Yes, he is.

Q. Have you ever had any discussion with Mr. Horton about the effect of this lawsuit on the pricing of Morton?

A. Would you repeat that again?

Q. Have you ever heard Mr. Horton say, in substance or effect, that "We have to stay under wraps so long as this lawsuit is on, and as soon as it is over we will be able to deal and wheel a little better"?

A. No, sir.

Mr. Schafer: If Your Honor please, that is clearly inadmissible. What the employee of Mr. Chapman may have said about Morton's pricing policy clearly is not admissible, your Honor.

Mr. Alioto: You asked about his 1962 prices.

Mr. Schafer: I didn't ask anything about what Mr. Horton said about it.

The Court: Overruled.

By Mr. Alioto:

Q. Does Mr. Horton contact the trade here in Salt Lake City?

A. Yes, sir, he does.

Q. Have you ever had a discussion with any official of the Morton Company about the effect which this lawsuit has had upon Morton's prices in this area?

A. No, sir.

Q. Now, in connection with prices prior to the filing of this lawsuit, would you be good enough to tell the Court and jury, Mr. Chapman, what the expression on the Morton [fol. 180] invoice, which is part of Exhibit 14 in this case, the expression "ppd" means on the invoice in the lefthand corner?

A. I don't know what that means, sir.

Q. You don't know whether it means "prepaid"?

A. No.

Q. Well, let me ask you whether, in the light of your business experience, you know what "prepaid" on any invoice means?

A. It normally means prepaid freight.

Q. And it normally means, does it not, that the freight was prepaid by the seller?

A. Yes.

Q. So if this invoice carries the normal meaning, it would mean, would it not, that on this shipment of apple pie at 2.89 in Salt Lake City the freight was prepaid by the seller, namely, the Morton Company?

Mr. Schafer: Now, your Honor, he has testified he didn't know. Now he is just being asked to guess.

The Court: How about that?

By Mr. Alioto:

Q. Do you know?

A. Yes, I know.

Mr. Schafer: I am sorry. I thought he just testified he didn't know. I am sorry.

A. This invoice is to Associated Food Stores in Pocatello.

By Mr. Alioto:

Q. Yes.

A. And every shipment that I sold to those people was prepaid from—prepaid to their dock.

Q. To their dock?

A. Yes, sir.

Q. So that means that the Morton Company paid the freight to their dock?

A. Yes, sir.

Q. In Ogden?

A. In Pocatello.

Q. In Pocatello, yes. Now, would that also be so on the "prepaid" which appears on Exhibit 14, made out to Grocers Wholesale in Salt Lake City, Utah, f.o.b. prepaid. Does that mean exactly the same thing?

A. No, sir. Because these people picked it up with their own equipment at Watsonville.

Q. Then "prepaid" means something different, does it, in that sense?

A. I do not know what "ppd" means.

Q. Okay. When counsel was interrogating you, Mr. Chapman—excuse me. Before we leave this price matter, I take it since you charged $4 in 1962 that you believed that that was a fair market price.

A. No. We charged $4 in 1961, too.

Q. But I take it you believed the $4 for 1961, as well as for 1962, was a fair market price.

A. No, it was not.

[fol. 181] The Court: What was the answer?

Mr. Alioto: "No."

By Mr. Alioto:

Q. Why did you charge a price that you didn't think was a fair market price?

A. That was the price that was given to me by Morton.

Q. Well, did Morton ever suggest to you that their prices in the market were not fair?

A. That's right.

Q. They did not?

A. We had several temporary price declines during 1962.

Q. I am saying, did the Morton Company ever suggest to you, in connection with its pricing, that it was not offering fair prices in this market?

A. No.

Q. Now, on the matter you were discussing with counsel about the buyers in this area, would you be good enough to look at a list which we secured from the Pet Milk Company, just run over that list, and state whether or not you are generally familiar with the group of buyers set out in that document.

A. With the group?

Q. With the buyers set out in that document. Do you know them?

A. No, I do not.

Q. Well, let's go down the list and see about that. Do you know the IGA Stores in Salt Lake City?

A. Utah Wholesale Frozen Foods is buyer for IGA Stores.

Q. But you do know they exist in Salt Lake City?

A. Yes.

Q. Do you know the AG Stores in Salt Lake City?

A. Yes.

Q. Do you know the Albertson Stores in Salt Lake City?

A. Yes.

Q. Do you know the IGA Stores in Pocatello?

A. Yes.

Q. Who buys for them?

A. Idaho Wholesale.

Q. Do you know the Albertson Stores in Pocatello?

A. Yes.

Q. Who buys for them?

A. Albertson Distributing in Boise.

Q. Do you know the IGA Stores in Twin Falls?

A. Yes.

Q. Who buys for them?

A. Utah Wholesale.

Q. Do you know the 79 Buttrey Stores (spelling) B-u-t-t-r-e-y, in Great Falls, Montana?

A. No, sir.

Q. Never even heard the name?

A. Yes, I do. I have heard the name.

Q. Who buys for them?

A. I don't know.

Q. Do you know the AG Stores in Helena, Montana?

A. Yes.

Q. Associated Grocers.

A. Yes.

Q. Who buys for them?

A. Do you want the individual's name?

[fol. 182] Q. No. The organization.

A. AG in Helena.

Q. That is Associated Grocers?
A. Right.
Q. In Helena. Do you know the AG Stores in Boise?
A. Yes.
Q. Who buys for them?
A. AG in Boise.
Q. Do you know the Albertson Stores in Boise?
A. Yes.
Q. Well, there is a longer list.

Mr. Alioto: We will put this in evidence, if your Honor please, offer it in evidence.

(Plaintiff's Exhibit No. 20 was thereupon marked for identification.)

• • • • • • •

(Document marked Plaintiff's Exhibit No. 20 for identification was received in evidence.)

Mr. Alioto: If I may just simply indicate, if your Honor please, to the members of the jury. This is a list of a group of stores in what is called the Salt Lake Division of the Pet Milk Company and lists some 1,238 stores by name and by number within the group.

By Mr. Alioto:

Q. One last thing, Mr. Chapman: Counsel interrogated you about the fact that the Utah Pie Company had a competitive advantage in this area because it was able to deliver small lots to individual purchasers, and Morton was not.
A. Correct.
Q. That competitive advantage arises from no other fact [fol. 183] than the fact that they are located in this area, their plant is here, that is correct, is it not?
A. Yes.

• • • • • • •

By Mr. Alioto:

Q. Let me put it this way, one last question: You will agree with me, will you not, in the light of your business experience, that the only competitive advantage that the Utah Pie Company has in this area with respect to small shipments is a competitive advantage which arises from its natural location and that the other companies in this case have that same advantage wherever they are located?

A. Yes.

Mr. Alioto: We have no further questions.

Recross examination.

By Mr. Schafer:

Q. In your experience in the industry, Mr. Chapman, do manufacturers usually make quantity breakdowns for shipments?

A. Yes.

Q. In other words, they quote prices on various quantity lots, is that right?

A. Yes.

Q. Do you know of any manufacturer in the industry, Mr. Chapman, who offers one price, never mind whether you buy a thousand dozens or one dozen?

A. Yes, the Utah Pie Company.

Q. Do you know of any other manufacturer that does that?

A. No, I don't.

Q. I should like to show you, Mr. Chapman, Plaintiff's Exhibit 20, which was just introduced into evidence, and ask you to read off for us of the twenty or so stores, or groups of stores, listed there how many of those names you identify as being within the Salt Lake City marketing area.

A. The IGA Stores, AG, and Albertson's.

Q. So that of the 20 or 25 stores listed on this list, your testimony is that only three of them are located within the Salt Lake City marketing area?

A. Yes.

Q. I take it Denver is not in the Salt Lake City marketing area?

A. That is correct.

Q. Is Longmont, wherever that is? Do you know where it is?

A. No, I don't know where that is.

Q. Or Grand Junction?

A. I assume in Colorado.

Q. Pueblo?

A. Colorado.

Q. Spokane, Washington, is that in the Utah marketing area?

A. No.

[fol. 184] Q. Now, in respect to the three stores, or groups of stores, listed here that are within the Salt Lake City marketing area—you have named them as IGA, AG, and Albertson's—*how many buyers* do those three names represent?

A. They represent two buyers.

Q. AG, I take it, is a buyer?

A. That's right.

Q. A buyer, I should say, from the manufacturer?

A. Yes, sir.

Q. Albertson's is not a buyer from the manufacturer?

A. No.

Q. How does Albertson's buy?

A. Albertson's buy their merchandise from Utah Wholesale.

Q. How does IGA buy?

A. From the same source.

Q. So that of this list of 25 or so names we have only two buyers within the Salt Lake City marketing area?

A. Yes.

Q. You testified that Morton's apple pies had been reduced in price in 1962 on only several occasions, I think you said.

A. That is right.

Q. What does that mean, two or three, or what does that mean?

A. I believe two.

Q. Do you recall to what price the Morton's price was reduced in 1962?

A. Three dollars.

Q. Three dollars?

A. Three dollars.

Q. And for how long a period of time?

A. Two to three weeks.

Q. And that was after the date of the complaint?

A. Yes, it was.

Q. Has Morton reduced its peach prices in 1962?

A. No, sir.

Q. Has the Utah Pie Company reduced its peach prices in 1962?

A. Yes.

Q. To what level?

A. $2.90 a dozen.

Q. Do you know of any reason, from your experience in the market, why the Utah Pie Company would have had to reduce its price to $2.90 on peach pies?

A. No, sir.

Q. Am I correct in understanding that the Utah Pie Company's price of $2.90 on peach pies was the lowest price on peach pies in the Salt Lake City market?

A. Yes.

Q. Has Morton reduced the price of its cherry pies?

A. No, it has not.

Q. Has the Utah Pie Company reduced the price of its cherry pies?

A. Yes.

Q. To what level?

A. $2.90 a dozen.

Q. Do you know of any other competitor in the marketing area that reduced its prices to an equivalent level?

A. No.

Q. Do you know of any reason, from your experience in the market, why the Utah Pie Company would have had to reduce its price on cherry pies to $2.90?

A. No.

Q. I think you testified that the Utah Pie Company [fol. 185-186] makes four flavors of fruit pies—I'm sorry, I think you said five flavors.

A. I said apple, cherry, boysenberry, peach, and blueberry.

Q. So that on three of those five flavors the Utah Pie Company now is quoting prices of $2.90?

A. That's correct.

Q. And on none of those three flavors do you know of any reason why they would have had to do so in terms of competitive activity in the market place.

A. That is right.

Q. When the Morton Company, Mr. Chapman, has a list price of $4 on its, say, apple pies, what does that mean? I'm sorry, you may not understand my question. I take it that the way you sell pies in this market is: You offer some sort of an inducement off the list price in order to get the retail stores to advertise your product, is that correct?

A. That is correct.

Q. So that when you are quoting a $4 price, am I correct in understanding that that simply means you haven't got some sort of a temporary, two or three week, price allowance offered in the market place?

A. That is correct.

Q. Am I correct in understanding that when the Morton Company is simply quoting its list price, that really isn't a realistic offer, is that right?

A. That's right.

Q. Four dollars is way above the marketing level in this market, is that correct?

A. That is correct.

Q. Do you try to sell Morton fruit pies when they are simply quoted at list price?

A. No.

Q. Does that mean you don't go around in the trade and try to induce them to buy at $4?

A. I would be foolish to do that. I don't.

Q. Tell us why.

A. Because I would be completely out of line. I would be too high.

[fol. 187] GRANT R. CALDWELL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Caldwell, would you be good enough to state your full name for the record?

A. Grant R. Caldwell.

Q. And where do you reside, Mr. Caldwell?

A. Salt Lake City, Utah.

Q. What is your business or occupation?

A. I'm a certified public accountant.

Q. And where do you have your business office in Salt Lake City?

A. 321 First Security Building.

Q. What is the name of your firm?

A. Caldwell, Nielson, Campbell & Company.

Q. For how long a period of time have you been an accountant?

A. Thirteen years.

Q. What is your professional training?

A. Graduate from the University of Utah, Major in accounting.

Q. Mr. Caldwell, at our request have you made an examination of various books and records and documents which have been produced by the defendants in the course of discovery proceedings in this litigation?

A. Yes, sir.

Q. And in that connection have you also visited the offices of any of the defendant companies to look at certain records of the defendant companies?

A. Yes, sir.

Q. Would you generally state for the record—and do this generally, rather than specifically, at this moment—the nature of the business records to which you have been given access?

A. It's been primarily confined to operating statements which the company has prepared in the ordinary course of business, pricing lists, certain invoices, and other accounting studies prepared by the defendants in their offices in the ordinary course of business.

Q. Now, from this material have you made certain studies setting forth the profits and losses of the various defendant companies in the Salt Lake Division, as contrasted with the other divisions in which these companies operate?

A. Yes, sir, as nearly as the allocation or the breakdown can be made or was made available.

Q. Okay. I want to invite your attention, Mr. Caldwell, to Plaintiff's Exhibit 21 for identification, which has been marked for identification but is not yet in evidence. Would you be good enough to explain to the Court and the jury [fol. 188] generally what that exhibit is?

A. This is for defendant Pet Milk Company. It indicates the operating results or the profit and loss in the Salt Lake Division, the San Francisco Division, and all divisions for the years 1958 and 1959.

Q. From what sources was this document prepared, Mr. Caldwell?

A. This was prepared from the company's own statements.

Q. And a copy of this has been in the possession of the defendant companies for some time, has it?

A. Yes, sir.

Q. Would you have made this available to their auditors?

A. Yes, sir.

Mr. Alioto: We'll offer this in evidence, if your Honor please.

Mr. Lamb: No objection.

(The exhibit marked Plaintiff's Exhibit No. 21 for identification was received in evidence.)

Mr. Alioto: This exhibit, ladies and gentlemen, sets out for the Pet Milk Company on the first page a summary of operations of frozen fruit pies in 1958 and 1959, first for the Salt Lake City Division, then the San Francisco Division, and third, all sales divisions.

By Mr. Alioto:

Q. Now, would you be good enough to make a general statement, Mr. Caldwell, as to what is contained on the first page of Exhibit 21 in evidence?

A. It indicates the total number of dozens of frozen pies sold.

Q. In what year?

A. 1958 and 1959, the gross sales, the various categories of expenses, and the net profit or loss.

Q. Now, were these taken right from the books and records of the Pet Milk Company?

A. Yes, sir.

Q. Now, would you be good enough to state whether or not those records disclose a profit or loss for the Salt Lake City Division on frozen fruit pies by the Pet Milk Company for the years 1958 and 1959?

A. It indicates a loss in 1958 of $67,027 and a loss in the year 1959 of $51,184.

Q. Now, how about the San Francisco Division?

A. The San Francisco Division lost $147,771 in 1958 and $190,250 in 1959.

Q. And how about all sales divisions on frozen fruit pies of the Pet Milk Company in those two years?

A. In 1958 all sales divisions lost $921,270, and in 1959, $573,356.

Q. Now then, would you be good enough to state generally [fol. 189] what you have done on the second page of Exhibit 21?

A. The second page is the same financial information broken down by amounts per dozen. It indicates gross sales, net sales, cost of sales, gross profit, selling, and general and administrative expenses, all in terms of per dozen. And then the profit or loss per dozen.

Q. Now, this is on a per dozen basis?

A. Yes, sir.

Q. And what does that disclose as to whether or not there was a loss per dozen in the Salt Lake City area.

A. It indicates that in 1958 there was a loss of 72 cents per dozen. In 1959, a loss of 43 cents per dozen.

Q. And for the San Francisco Division?

A. In San Francisco, in 1958, 59 cents per dozen; in 1959, 48 cents per dozen; and in all sales divisions, in 1958, 74 cents per dozen, and in 1959, 35 cents per dozen.

Q. The contrast for the total two years, 56 cents per dozen were lost for Salt Lake City, and 52 cents per dozen in all sales divisions?

A. That is correct.

Q. So that the loss in Salt Lake City was greater than in the other sales divisions; is that correct?

A. That is correct, for the two years total.

Q. Now then, on the third page, Mr. Caldwell, would you be good enough to state generally what that is? It's the third page of Exhibit 21.

A. This indicates for 1960 and 1961, the operations of the Pet Milk Company for their various divisions. There was a change in accounting in 1960, whereby they ceased accounting on a divisional basis and went to product account-

ing. This, of course, includes the national figures. The products which we have set out separately are the Pet brand, the Pet-Ritz brand, and the Swiss Miss brand.

• • • • • • • •

[fol. 190] By Mr. Alioto:

Q. Okay. Now then, does that indicate that a loss was suffered for the years 1960 and '61, as well as the prior years?

A. Yes, there was a loss in each of the years.

Q. Now, you in another exhibit have actually summarized that loss for us, have you not, for all of the years in question?

A. Yes, sir.

Q. So we'll just go on. And what does the last page of this Exhibit 21 show?

A. It's the same information, broken down on a per dozen basis for each of the brands in each of the years.

Q. And naturally, that would show a loss on a per dozen basis, as well as on an over-all basis?

A. Yes, sir.

Q. Now, Mr. Caldwell, did you prepare substantially the same study for the Carnation Company?

A. Yes, sir.

Q. And is that contained in a document which you have titled, "The Carnation Company, the Summary of Territorial Profit and Loss on Frozen Fruit Pies for the Pacific Northwest, Mountain States, Southern California, Northern California, and the total western divisions"?

A. Yes, sir.

Q. From which source or from what source did you prepare this document?

A. This was from the company's books and records, the statements which they had prepared.

Q. I take it that you prepared one copy originally, and then there was some consultation between you and the Carnation accountants?

A. Yes, sir.

Q. Resulting in some modifications?

A. We computed the amounts based upon an accumulation of their monthly figures and found that they made certain year end adjustments, but didn't change the monthly statements.

Q. This has been prepared generally in the same fashion as the *preceeding* exhibit, has it not?

A. Yes, sir.

Q. And to the best of your knowledge, Mr. Caldwell, does it accurately reflect the basic facts set forth in the books of the Carnation Company?

A. Yes, sir.

Mr. Alioto: We'll offer it into evidence as the Plaintiff's Exhibit next in order.

[fol. 191] Mr. Billings: May I voir dire this witness?

The Court: Yes.

Voir dire examination.

By Mr. Billings:

Q. Mr. Caldwell, in connection with the preparation of Plaintiff's proposed exhibit 22, did you use these Carnation Company's frozen food division territorial profit and loss statements?

A. Yes, sir.

Q. I show you here such documents marked, "Year to Date for the years 1959, 1960, and 1961."

A. I might say this, Mr. Billings, that we originally used the monthly statements and accumulated them for the twelve month period. The statement which you have in your hand was furnished me on Sunday by Mr. Bye.

Q. You hadn't seen these before?

A. That's correct, before Sunday.

Q. Now, have you checked figures which appear on Exhibit 21, is it? 22? Have you checked them against these territorial profit and loss year to date figures which I have in my hand?

A. It was checked by a member of my staff, yes, sir.

Q. So in effect, as I understand it, then, the exhibit which you hold in your hand and the sheets which I have in my hand are mere copies of each other; is that correct?

A. That is correct. Uh-huh. Yes, sir.

Q. Now, turning to the second page of the exhibit, where you've done it by costs, there you copied the per cost figure or per case figures and doubled them which are on these books and records of the Carnation Company?

A. Yes, sir.

Voir dire examination.

By Mr. Billings:

Q. Or did you take the figures which were on page 1 and divide the total number of dozens, or total number of cases, in the gross sales—which way did you do it?

A. We re-divided.

Q. You re-divided?

A. We re-divided.

Q. You didn't copy from—

A. No.

Q. Did you check to see if these figures, which are on your proposed exhibit, are the same as on the material which was furnished you?

A. I am sure they were checked, yes, sir.

Q. Now, I notice that on your proposed Exhibit 21, or 22, whichever it is, you have listed just three divisions of the Carnation Company. Is there any particular reason why there are just those three and not the rest of them which are on here?

[fol. 192] A. Yes, sir. Because originally we were only furnished with those three division figures. The rest had been blacked out. The other divisions, of course, do appear on the statements which you have in your hand, which, as I say, the first time I seen them was on Sunday.

Q. You were furnished down in California, in Los Angeles, the offices of the Carnation Company, all of the

profit and loss statements for all the divisions, were you not? Were they not made available to you?

A. This is the first time I have seen these statements, Mr. Billings, on Sunday.

Q. How about the monthly profit and loss statements?

A. The monthly profit and loss statements we had before we went to Los Angeles.

Q. For all divisions?

A. No. For the three divisions which we have here, and the total Western Division.

Q. When you went to Los Angeles there were made available to you all of the profit and loss statements for all of the divisions of the company, isn't that correct?

A. I don't think so, Mr. Billings. My recollection is not, that we were confined to the Pacific Northwest, Mountain States, Southern California, Northern California, and the total Western Division, which was the information contained on the monthly statements which had been previously furnished us.

Q. Do you have, Mr. Caldwell, in your possession now the territorial profit and loss year to dates for the years 1959, 1960, and 1961?

A. Yes, I do. Yes, I have copies of them, yes, sir.

Q. You have the copies which were furnished to you?

A. Yes, sir, on Sunday.

Mr. Alioto: On Sunday.

By Mr. Billings:

Q. From which this document was prepared?

A. Yes, sir.

Mr. Billings: I would like to have those marked and put in evidence at this time, if I may, as the basic documents.

Mr. Alioto: I don't think you have a right to, but I will be glad to do it.

* * * * * * *

[fol. 193] Direct examination (continued).

By Mr. Alioto:

Q. Mr. Caldwell, you asked for these other divisions when you were in Los Angeles sometime ago, didn't you?
A. I think that is correct.
Q. It was not until last Sunday you received them.
A. That is correct.

Mr. Alioto: We have no objection to attaching—Mr. Billings, do you want to stand with me here so you can watch this attachment.

If your Honor please, at a later juncture we will try to do a more artistic job with this attachment, but as it is, we will offer it in evidence as plaintiff's exhibit next in order.

The Court: Any objection?

Mr. Billings: I have no objection, your Honor.

The Court: Received.

(Document marked Plaintiff's Exhibit 22 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Caldwell, with respect to the Carnation document, would you be good enough to tell us generally, again, so we can orient this—not "again," but tell us what this document purports to show.

A. It purports to show the number of cases sold, the sales price, the various expenses, and the operating profit or loss in each of the territories—that is, the Pacific Northwest Mountain States is one territory, the Southern California territory, the Northern California territory, and the total Western Division.

[fol. 194] Mr. Alioto: I think we can get at this faster, since it is in evidence, your Honor, if I simply read these totals off to the jury.

For the Pacific Northwest and Mountain States—

By Mr. Alioto:

Q. Now, that includes the State of Utah, does it not?
A. Yes, sir.
Q. And the State of Idaho?
A. Yes, sir.
Q. And Nevada?
A. Yes, sir.

• • • • • • •

[fol. 195] Q. Incidentally, Mr. Caldwell, I don't see anything on this exhibit for the year 1958. Is there some reason for it?

A. The information was not furnished, or not available.
Q. Did you ask for it?
A. Yes, sir.
Q. What were you told?
A. It was not available.

Q. Now, Mr. Caldwell, Plaintiff's Exhibit 23 for identification purports to be an analysis of operations, 1958, 1959, 1960, and 1961, for the Continental Baking Company, the Morton Frozen Foods Division.

Would you be good enough to state from what source materials you prepared this exhibit?

A. This was prepared from a quarterly breakdown that was furnished by Continental Baking Company for the two regions indicated and included in these exhibits.

Q. Now, what are those regions?

A. The first is Region 8 and—through 1961 that same region apparently was reclassified in 1961 and Region "W".

Q. Do you have a study for each region for the years 1958 to 1961?

A. Yes, sir.

Q. Were you given any information, or was there any information on the books and records of the Continental Baking Company, which indicated what states were encompassed within those regions?

A. They indicated that in the Region 8, which later became the Region "W", that Utah, Idaho, California, Oregon, and Washington was included in there, but we have no

knowledge of what other states may have also been included.

Q. Did you inquire about that?

A. Yes, sir, I am sure that we did make an inquiry. We have never received a clear answer as to just what states were included in there.

Q. Did you inquire about whether or not the Continental Baking Company set out its books so that you could get the profits and losses from the Utah territory alone?

A. I am sure that was requested, and we were informed that these schedules had to be prepared specially for this case, that in the normal course of business they did not keep, in their books and records, a divisional breakdown of operations.

Mr. Schafer: Your Honor, as to the last two questions, Mr. Alioto asked whether the witness knew, and the witness didn't say he knew. He said, "I am sure." In other words, the witness is simply guessing whether this information was ever requested and what the answer was if it was requested. I think the last two questions—I move that they be stricken.

[fol. 196] The Witness: I am certain, Mr. Schafer, that the information was requested.

Mr. Schafer: Do you know whether it was requested?

The Witness: Yes, sir, I do.

Mr. Schafer: You do?

The Witness: Yes, sir, I do.

By Mr. Alioto:

Q. In any event, what you have here in Exhibit 23 for identification, according to your best knowledge, Mr. Caldwell, accurately sets forth the facts that you gleaned from the books and records of the Continental Baking Company in the form in which they were made available to you?

A. Yes, sir.

Mr. Alioto: We will offer this in evidence, if your Honor please, as plaintiff's exhibit next in order.

Mr. Schafer: Your Honor, I wonder if I might have a statement of purpose at this time?

The Court: No.

Mr. Schafer: Is it offered to prove that the Continental Baking Company has been conspiring—

The Court: I told you we weren't going into that now.

Mr. Schafer: If it is offered to prove a conspiracy, your Honor, I submit it is inadmissible.

Moreover, the document shows Continental Baking Company's total profit or loss in these two districts for all of its products, 53 separate products. What this case involves is the charge that Continental Baking Company has sold at a loss in Salt Lake City marketing area six products, apple pies, cherry pies, boysenberry pies, peach pies, mince pies, and pumpkin pies. That is what the issue is.

Unfortunately, Continental Baking Company doesn't have a profit and loss statement in terms of those products. This covers 53 separate products. It doesn't prove a thing about this case.

[fol. 197] Moreover, the geographical area involved is way beyond the Salt Lake City marketing area. It simply doesn't tell us whether or not the Continental Baking Company was selling the six flavors at a profit or a loss in Salt Lake City in 1958, 1959, 1960, and 1961, so it is of no help to the issues in this case.

I therefore move that it not be admitted into evidence.

Mr. Alioto: Is there any question but what pies are included in those totals?

Mr. Schafer: There's no question but what pies are included.

Mr. Alioto. This is the best we have, your Honor, from a company that claims it didn't have anything else. We will offer it at this time, and we will expect, of course, to supplement it with a study based upon the testimony of Mr. Chapman, which has just been concluded this morning. We are told that the Continental Baking Company doesn't have these kinds of records.

Mr. Schafer: The fact of the matter is it doesn't have. This includes meat pies, pot pies, chicken pies, everything

else in the Morton line. It is of no help. Why don't we get a study of the six flavors?

The Court: Why don't you give it to him?

Mr. Schafer: We don't have one, your Honor. We told him that.

The Court: The objection is overruled. The exhibit is received in evidence.

(Document marked Plaintiff's Exhibit 23 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Caldwell, were you in the offices of the Continental Baking Company?

A. No. I was not.

Q. Were you given the opportunity to look at the original books and records of the Continental Company?

A. I was given the opportunity. However, we relied upon the statements made that the information was not available, that they didn't keep their books and records in a manner in which it could be obtained.

[fol. 198] Q. Who made that statement to you?

A. It was contained in a deposition, actually, and I am sure that Mr. Schafer and I have had some questions back and forth in regard to certain of the accounting matters also.

Q. He told you the Continental Baking Company didn't have those records segregated down to pies, is that correct?

A. I don't remember whether Mr. Schafer specifically said that, but I know it was contained in the deposition of the accounting officer of Continental Baking Company.

Q. Now, then, Mr. Caldwell, what we have then is the Morton Frozen Foods Division, an analysis of operations by region?

A. Yes, sir.

Q. Would you be good enough to state with respect to that matter what it is that you do have, just the general nature of this exhibit.

A. It indicates the gross sales, the cost of sales, the various operating expenses, and the profit or loss before taxes in the two regions.

Mr. Alioto: Now, I can quickly tell the jury what that generally shows.

It shows a loss of $5200 in 1958, a loss of $3300 in 1959, they are at about break-even in 1960, a profit of $9,900 in 1961. That second division has a loss of $19,—or the second region, which includes Salt Lake, a loss of $19,000 in 1958, a profit of $1800 in 1959, a loss of $500 in 1960, and a profit of $4300 in 1961.

• • • • • • •

Q. Now, then, with respect to this last year, 1961, where there appears to be an overall profit of approximately $13,000 combined, that doesn't mean, does it, that there was any profit on frozen fruit pies sold in Mr. Chapman's territory?

Mr. Schafer: Does he know, your Honor?

Mr. Alioto: Of course he knows.

The Court: Ask him.

Mr. Schafer: Ask him.

The Court: You ask him. Do you want to voir dire this fellow?

Mr. Schafer: I think he ought to lay a foundation. Does he know or doesn't he?

[fol. 199] The Court: Will you please tell the Court whether you know, Mr. Caldwell.

The Witness: I will say this, that it is certainly not an indication that any profit was made in Salt Lake City, based upon the prices at which they were selling pies, which was lowest in 1960. It doesn't appear feasible that there should be a profit in comparison with the other periods.

• • • • • • •

By Mr. Alioto:

Q. Now, then, Mr. Caldwell, there has been marked for identification as Plaintiff's Exhibit 24 a document entitled

"Comparison of Net Sales Price Per Dozen in the Salt Lake Division with Net Sales Price Per Dozen in all other Sales Divisions of the Pet Milk Company."

A. Yes, sir.

Q. Would you be good enough generally to state to the Court and jury the source from which the information set out on Plaintiff's Exhibit 24 for identification—the source used by you in connection with procuring the information set out in Plaintiff's Exhibit 24 for identification.

A. This was prepared from Pet Milk Company documents furnished us.

Q. And do the figures set forth in Plaintiff's Exhibit 24 for identification accurately portray the facts as you secured them from these documents of the Pet Milk Company?

A. Yes, sir.

Q. And these are internal documents of the Pet Milk Company?

A. Yes, sir.

Mr. Alioto: We will offer it in evidence, if your Honor please, as our exhibit next in order. Counsel has indicated to me he would like additional time to study this particular exhibit, since it was handed to him last night. And I have no objection to deferring the ruling on the offer until such time.

By Mr. Alioto:

Q. Now, Mr. Caldwell, I call your attention to Plaintiff's Exhibit 25 for identification, which purports to be a comparison of the gross sales price and net sales price per dozen for Pet-Ritz brand pies between Salt Lake City invoices furnished and the total sales by the Pet Milk Company. Would you be good enough to indicate the source from which this material was prepared.

A. The information for the Salt Lake invoices was obtained from an IBM run which was recently furnished us by the Pet Milk Company. The information for the total sales was contained in documents furnished us by Pet previously.

[fol. 200] Mr. Alioto: We will offer those in evidence—

By Mr. Alioto:

Q. And do the figures set out in this document, to the best of your knowledge, accurately reflect the facts as stated therein?

A. Yes, sir.

Mr. Alioto: We will offer this in evidence, if your Honor please, as plaintiff's exhibit next in order and request that the ruling on this be deferred until a later time, at the request of Mr. Lamb, which we discussed at recess.

By Mr. Alioto:

Q. Mr. Caldwell, I call your attention to Plaintiff's Exhibit 26 for identification, which purports to be a comparison of the Pacific Northwest-Mountain States Division's operation with all other frozen foods division operations.

A. Yes.

Q. Did you prepare that study?

A. Yes, sir.

Q. Was this prepared from the books and records of the Carnation Company?

A. Yes, sir.

Q. Do the facts therein contained accurately set forth the facts set out in the books and records of that company?

A. Yes, sir.

Mr. Alioto: We offer it in evidence, if your Honor please, as our exhibit next in order.

* * * * * * * *

By Mr. Alioto:

Q. Mr. Caldwell, Exhibit 27 for identification purports to be a study indicating the computed net profit or loss per dozen on apple, cherry, boysenberry, and peach frozen pies for the Pet Milk Company.

A. Yes, sir.

Q. Would you be good enough to indicate the source from which this material was prepared.

A. This has been prepared from documents and accounting records furnished us by the Pet Milk Company.

Q. To the best of your knowledge, are the facts set out in this exhibit accurate from the standpoint of the source from which they were derived?

A. Yes, sir.

[fol. 201] Voir dire examination.

By Mr. Lamb:

Q. Mr. Caldwell, is this document prepared in accordance with accounting procedures, regular accounting procedures known by you?

A. Yes, sir.

Q. Whose theory was this? Was this the suggestion of Mr. Alioto?

A. It was prepared under Mr. Alioto's direction, yes, sir.

Q. In other words, you were instructed to choose the lowest price and the highest cost, and to average this out in order to show a fictitious loss in a column which you describe as profit or loss before all other expenses?

A. No, sir, Mr. Lamb. Those were certainly not the instructions. Prices used—the net price per dozen purports to be the absolute net price, which is indicated very clearly on the schedule heading.

Q. At full truck?

A. At full truck, yes, sir, the lowest absolute net price. This was based upon a study which we made for each of the defendants in arriving at what we term the absolute net price. And I am sure that a copy of that schedule has been previously furnished each of the defendants.

Now, that absolute net price purports to be this: that it is the truck load price less all of the so-called deals and less the cooperative advertising. The cooperative advertising essentially, all three defendants, began in 1957 with a 5 cents per case or 10 cents per dozen. In approximately April of 1960 Continental went to two and a half cents per

case or 5 cents per dozen, and in July of 1960 the other two defendants dropped it to two and a half cents per case or 5 cents per dozen, and then it was entirely eliminated in 1961. So the price is the truck load price less the deals less the cooperative advertising allowance which we have also eliminated in the expense application. The manufacturing costs further—we have weighted those sales prices in a product mix, which we felt to be representative of all of the defendants. That product mix was furnished us by Carnation Company. The manufacturing costs per dozen are the manufacturing costs which was furnished us by each of the defendants.

Q. What do you mean by a "product mix"?

A. That is that at any one period of time there would be approximately, let's say, 40—or 50 per cent apple flavor sold, 30 per cent cherry, perhaps 15 per cent peach, and maybe 5 per cent boysenberry. There is a schedule attached indicating for each of the years that product mix.

* * * * * * *

[fol. 202] Q. But this document was designed by you under the instructions of Mr. Alioto?

Mr. Alioto: I submit this is argumentative and is not voir dire.

The Court: Yes. The objection is sustained.

By Mr. Alioto:

Q. Mr. Caldwell, on the basis of your experience as an accountant, state whether or not you have an opinion as to whether or not the study which is Exhibit 27 was prepared in accordance with good accounting practices.

A. Yes.

Mr. Alioto: We'll offer it in evidence, if your Honor please, as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Lamb: I object, your Honor. This document is irrelevant and does not tend to prove or disprove any of the issues of this case.

The Court: Objection—is that all? The objection is overruled. The document is received.

[fol. 203] (The exhibit marked Plaintiff's Exhibit No. 27 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Caldwell, in connection with this matter, state what my instructions to you were, as long as there's been some suggestion that I asked you to make up some fairy stories.

A. The instructions were to prepare a schedule predicated upon the price lists for apple, using the absolute net price, using the manufacturing costs as furnished by the defendants, and the other costs as reflected in their profit and loss statements.

Q. Now, let me make this plain. Is this study predicated upon net price per dozen taken from any invoices representing the actual sale prices, or were they taken from the offerings or the price lists of these companies?

A. They were taken from the offering or price lists of the companies.

* * * * * * *

[fol. 204] Mr. Alioto: We'll offer this in evidence, if your Honor please.

* * * * * * *

Voir dire examination.

By Mr. Billings:

Q. Let's just go across the top of this proposed Exhibit 28, Mr. Caldwell. The first one is captioned, "Effective Price Date" and then I assume you've taken a number of various points of time.

A. Let me say this, Mr. Billings. We have taken all of the price changes in the price of apple pie.

Q. These reflect then—

A. During that entire period. There are no exclusions whatsoever. That's all of the price changes during that period.

Q. All right. Then you have four columns for four different flavors, net price per dozen. What is the source of the material shown in these four columns?

A. The price list, less the deals, less the co-op, advertising.

Q. The price lists which we furnished you, the deal list which we furnished you, and then the co-op; is that right?

A. Yes. The source of that specifically would be on the net pricing study, of which I'm sure you've been furnished a copy.

Q. Yes. And then the weighted average net sales price is merely a computation based on these four different flavors, with the weighting in accordance with the figures that Mr. Bye of the Carnation Company gave you; is that right?

A. Yes, sir.

Q. And what's the source of your manufacturing cost per dozen, the next four columns?

A. The cost studies which you furnished us.

[fol. 205] Q. The Carnation Company cost studies?

A. Yes, sir.

Q. And they were for various period, were they not?

A. Yes, sir.

Q. And then with respect to the effective price date, you've taken the cost date; is that correct?

A. That's correct. Now, I might say this, that, of course, apparently the company did not make a cost determination of each of the price date changes. However, we used the cost information for the period within the—for which the cost determination had been made. So that may be used on several dates of price change there.

Q. In other words, if we got a cost study—

The Court: Now, now, you're going beyond what you said you wanted to do at this point. I don't want to divide this up.

Mr. Billings: I just want to find out—I'll reserve that for later, your Honor.

By Mr. Billings:

Q. And then the next column, weighted average—

Mr. Alioto: Do you have any objection to standing behind the witness, so you won't be between the witness and the jury?

Mr. Billings: I didn't intend to. I wanted he and I to look at the list at the same time.

Mr. Alioto: They ought to hear him, too, though.

By Mr. Billings:

Q. The weighted average manufacturing cost, then, is a computation based on the four *preceeding* columns on the same ratio, as the prices?

A. Yes.

The Court: I thought you were going to ask about the source.

Mr. Billings: That's correct.

The Court: Well, you're not asking. You're going beyond it.

By Mr. Billings:

Q. Now, the next column, net sales less manufacturing cost, what's the source of that information?

A. That's just the weighted sales less the weight of manufacturing.

Q. All right. And what's the source of the material on spoils?

A. Carnation Company and Pet Milk Company during most of this period was using one cent per case, or two cents per dozen, on spoils.

[fol. 206] Q. That isn't what I asked you. What was the source of this material?

By Mr. Schafer:

Q. How long have you been selling and buying pies in the frozen food industry, Mr. Chapman?

A. That is a hard question to remember the exact time.

Q. Give us the approximate time.

A. You mean that I have been buying and selling—buying fruit pies?

Q. How long have you been dealing with the frozen food industry in the Salt Lake market?

A. With the frozen food industry, I think the latter part of 1948.

[fol. 157] Q. And during that time you have been buying and selling frozen fruit pies—I'm sorry. I will retract that question, because I know it can't be right, because frozen fruit pies weren't available at that time.

A. That is correct.

Q. Frozen fruit pies, as I understand it, came into the market around 1955, is that correct?

A. I think that is correct.

Q. Have you been buying and selling frozen fruit pies since 1955?

A. Yes.

Mr. Schafer: I suppose, your Honor, that qualifies the witness as an expert as to why he can't sell or doesn't want to buy frozen fruit pies.

The Court: Sustained.

Mr. Schafer: Your Honor means that you are still sustaining the objection?

The Court: That is what I mean.

By Mr. Schafer:

Q. You have said, Mr. Chapman, that you felt there was a competitive advantage to having temporary price discounts showing on the face of the invoice rather than having billback which didn't show on the face of the invoice.

A. That's right.

Q. My question to you is whether or not you communicated this suggestion to Mr. Halvorsen of the Morton Company?

A. I did.

Q. I take it by your testimony—I want to be sure not to lead you— Did Mr. Halvorsen accept your recommendation, or did he exercise his own judgment as to how you were going to make your various concessions in the market?

A. He exercised some of his own judgment. We pretty well worked together on the thing.

Q. Did you testify that the first five or six price concessions that you tried in the market were billbacks?

A. That's right.

Q. I take it you were recommending price discounts which would show on the face of the invoice?

A. That's right.

Q. I take it by reason of the fact that they were not such, but were billbacks, that Mr. Halvorsen rejected your advice?

A. That is correct.

[fol. 158] The Court: Does that sound to you like a leading question?

Mr. Schafer: I thought it was a conclusion.

The Court: Will you read it back to him.

Mr. Schafer: I will withdraw it. I really don't care.

By Mr. Schafer:

Q. During this period of time, Mr. Chapman—let me ask you one question I forgot to ask you. Does it matter to the manufacturer, in terms of whether or not he pays for advertising performance in the one ad that the retailer has to place—does it matter to him how big the ad is?

A. No.

Mr. Alioto: Does it matter to which manufacturer?

Mr. Schafer: Make it Morton.

By Mr. Schafer:

Q. Does it matter to Morton how big the ad is that appears in the Thursday newspaper food section?

A. No, it can be a very small ad.

Q. During this period of time that you have testified you were trying to get new business on fruit pies, from October, 1960 to June of 1961, were you trying to get new business on any other products?

A. Any other Morton products?

Q. Any other Morton products, I am sorry.

A. I was trying to get business on the full line.

Q. Did you make various price concessions during that period of time on the other products in the Morton line?

A. Yes.

Q. These are products, I take it, that the Utah Pie Company does not manufacture?

A. They were all meat pies.

Q. Would you describe for us, Mr. Chapman, what Frozen Food Marketers is?

A. Frozen Food Marketers is the name of a small company that I have. I employ one salesman. We have a small office located in my home. We act as a broker, or a commission agent, for a number of frozen food packers. We sell products, frozen food products, in Utah and Idaho, and we are paid only on what we sell. We have no guarantee of any kind.

Q. Do you represent only the Morton line?

A. No. I represent five or six lines.

Q. Could you describe for us briefly what those lines are, what the names of the manufacturers are?

[fol. 159] Mr. Alioto: We submit it is not relevant to any issue in this lawsuit.

Mr. Schafer: It is relevant to the issue of the question of the independent contractor, the independent brokerage.

Mr. Alioto: I will withdraw the objection, if that is what we are talking about.

By Mr. Schafer:

Q. Without taking up too much time, just describe who the manufacturers are you represent.

A. Do you want the ones I represent as of right now?
Q. Yes.

Mr. Alioto: That is not relevant, that he represents right now.

By Mr. Schafer:

Q. The ones you represented in June of 1961.
A. I represented Minute Maid Corporation, on citrus juices; Chesshers, chickens, frozen chickens; Morton Frozen Foods, prepared foods and baked goods; Fullham Brothers, a line of frozen fish; Mr. Smith's Frozen Meat, which is what it says, frozen meat.
Q. Now, you have testified—again back to fruit pies, you testified that you tried various price concessions up to the period of June, 1961 and that then you recommended to Morton that they decrease the price to $1.15.
A. Right.
Q. And how long a period—your answer was yes?
A. Yes. I am sorry.
Q. How, Mr. Chapman, did you fix on the figure 2.85 as the effective delivered price in Salt Lake City as your recommendation to Morton?
A. We were interested in getting some business from Safeway or from any other big buyer in the area. We had thought of meeting the Swiss Miss pie price in Safeway, but after discussing that, we decided that wasn't good enough, because they could buy that priced pie every day of the week, and our price reduction would only be for a very short period. And, besides that, they were buying their Pet-Ritz, pies, or, I should say, Bel Air pies, packed by Pet-Ritz, and they were combining loads. So for me to go in there and offer them the same price would not get us any business.
We thought about Associated, and we figured out that on an ounce-per-ounce basis, that 2.85 was the same comparable price on a 22-ounce pie as a 3.10 was on a 24 ounce.
[fol. 160] Q. Why do you say 2.85 on a 22 ounce is comparable to 3.10 on a 24 ounce?

A. It was based on an ounce-per-ounce basis.

Q. When you based it on that, what do you come out with?

A. Well, you come out with an exact same equivalent.

Q. You mean that each ounce costs just as much in each pie?

A. Well, I assume so.

Mr. Alioto: If your Honor please, I make a motion to strike the assumption, because the assumption, I think anybody knows, is wrong, that an ounce costs the same in each pie.

Mr. Schafer: We will do it by arithmetic.

Mr. Alioto: If you can prove that, you are good.

The Court: The answer is stricken.

By Mr. Schafer:

Q. You said, Mr. Chapman, that the frozen fruit pie manufactured by the Utah Pie Company sold at 3.10, is that correct?

A. That is right.

Q. Now, I take it, in order to determine what the ounce cost, or price, of that product was, you would have to take the 24 ounces and multiply it by 12 to get the number of ounces in a dozen, is that correct?

. . . . . .

[fol. 161] Mr. Schafer: I am just talking about the price, the price quoted on an ounce basis by the Utah Pie Company on Frost 'N' Flame.

By Mr. Schafer:

Q. So you have to take the 24 ounces that are in a pie and you have to multiply it by 12, I take it, to make up a dozen?

A. That's right.

Q. You do that—I will try to get this correct—you get 288 ounces in one dozen pies. And you have testified that the Utah Pie Frost 'N' Flame pie was selling at $3.10, right?

A. That's right.

Q. So if you divide 2.88 into 3.10, you would get the ounce price charged by the Utah Pie Company?

A. That's right.

Q. I will now do that. That comes out, according to my calculation, at just about 1.08 cents per ounce.

Now, if we go through the same computation with respect to a 22 ounce pie, is it correct, Mr. Chapman, that you have 264 ounces in a 22-ounce pie, in a dozen of them?

A. That's right.

Q. And you said you recommended to Morton that they offer their 22-ounce pie at a price of 2.85 a dozen?

A. That's right.

Q. If you divide 264, then, into 285, you would get the ounce price per dozen, is that correct?

A. That's correct.

Q. Check me if I am wrong on this, Mr. Chapman, because this is your testimony.

The Court: I am afraid that will not make it so.

By Mr. Schafer:

Q. Now, Mr. Chapman, would you testify for me, please, as to what the ounce price charged by the Utah Pie Company was in June of 1961?

A. It is 1.08.

Q. What was the ounce price that you recommended Morton sell its 22-ounce pie at in June of 1961?

A. 1.08.

Q. Thank you. 1.08 cents, I think you mean?

A. Yes.

Q. You testified, sir, that in reaching your conclusion as to a recommendation to Morton of trying a 2.85 price in the market that you thought of the AG Stores, Associated Frozen Foods. My question to you, sir, is: Why did you think of the AG Frozen Food Stores after you thought of the Safeway Stores?

A. Well, I thought of all of them, as far as that goes. I thought we might stand a chance of getting some business

out of Associated, I didn't know. I was extremely doubtful [fol. 162] if we would get any business out of Associated, because I was only coming in and offering them the same identical price that they were paying every day, and my offer was strictly a spot offer for a two-to-three week period.

Q. In order for Associated, Mr. Chapman, to buy the pies at a price of 2.85, how many did they have to buy?

A. Twenty-four hundred cases.

Q. And what happens when AG Stores get 2400 cases all at once?

A. Well, they have a storage problem, of course, and they have money tied up in it.

Q. Am I correct, Mr. Chapman, that when you were a buyer—I am sorry, that will be leading.

As a buyer, Mr. Chapman, did you have any preference for ordering in small quantities as against large quantities?

A. Yes. That was quite an advantage to us to be able to order small quantities, because at the time we had a very, very limited warehouse, and the company didn't like to tie up any money in inventory.

Q. And in order to get the best price of the Utah Pie Company, the $3 price, when you were a buyer, did you have to buy in truck load quantities?

A. No. You could buy in any quantity from 15, 20 cases up.

Q. In addition, then, to the natural competitive advantage that Mr. Alioto identified as being derived from the location of the Utah Pie Company, would you identify the availability of the smaller shipments as a competitive advantage of the Utah Pie Company over its competitors?

A. They have a decided advantage over us. They can deliver the next morning after an order is placed that afternoon. It takes us a minimum of three or four days.

Q. Does this have significance competitively in the market place?

A. Sure, a great deal. Anybody can buy in limited amounts down there. We have to sell in trucks, half trucks, or quarter trucks. If we run out of pies, we can drop down

on Utah Pie and pick up a few pies. You can't do that with Morton. You can't go to Watsonville and pick up a few pies.

Q. When you were a buyer, Mr. Chapman, were you willing to advertise a manufacturer's pie if you couldn't advertise it at a retail price competitive with your competition?

A. We would never advertise a pie unless we were at least competitive or lower.

Q. As a broker now, do you find it necessary to offer, Mr. Chapman, a price to all the buyers in the market which would permit those buyers to quote a price as favorable at retail level as the lowest price of their competitors?

[fol. 163] A. That is correct.

Q. Their retail competitors?

A. That's correct.

Q. You have testified you made a sale—or, I should say, I guess, two sales, to Safeway of about 3,000 dozens each, is that correct? I'm sorry, with this 2.85 price.

A. I made two sales of 7500 cases each.

Q. Seventy-five hundred cases. Is it your recollection, sir, that the first order—I take it there were two orders. I think you testified there were two orders.

A. That is right.

Q. Is it your recollection that the first order that Safeway purchased was delivered by Morton?

A. The first order was delivered by a commercial carrier.

Q. At Morton's expense?

A. At Morton's expense, that's right.

Q. So Safeway took those pies at a 2.85 price?

A. That is correct.

Q. And they were apple pies?

A. That is right.

Q. And some coconut pies, I think you said?

A. That's right.

Q. I think you testified, to Mr. Alioto's question, that that first delivery occurred on about June 20—I may have that statement wrong; correct me—June 20, June 29, or something. Is that the right date?

A. It could have been. It was the latter part of June.

Q. And you offered the price to Safeway, I take it, on June 16?

A. That's right.

Q. Did that indicate that Safeway didn't take your offer, or didn't buy your offer right away?

A. It bought the offer that day.

Q. Why did it take so long to deliver it?

A. The order was cancelled.

Q. Who was the order cancelled by?

A. It was cancelled by Mr. Halvorsen.

Q. Why was the order cancelled? Didn't he want to sell 750 cases to Safeway?

A. Well, I got the order from Safeway just before noon on a Friday, and the stipulation on the order was that I could have the order if I could make delivery of two truckloads of pies to Safeway's warehouse in Salt Lake by 4:00 a.m. the following Monday.

I contacted Mr. Halvorsen to see if he could make the necessary arrangements to have that done. He later called me back, and we were able to work that out and make the necessary arrangements for two trucks. I confirmed that with Mr. Henzke that the two truckloads of fruit pies would be delivered at 4:00 a.m. the following Monday.

[fol. 164] That afternoon when I called at my home, my wife reported that Mr. Mike Walsh from Safeway had been trying to get in touch with me. I contacted Mr. Walsh, and he said that after I had left with the order on the fruit pies that some of my competition had come in there and offered them a lower price on apple pies. It amounted to 5 cents a case. And he was wondering if I could do anything about it, if there was anything that I could do to get the same price on my fruit pies.

This was, I guess, 4:30, quarter to five in the evening.

I had no authority whatsoever to give anybody a price. So I called Mr. Halvorsen. I finally got hold of his secretary and she got hold of Mr. Halvorsen, and I talked to him. In fact, I got him out of a barber chair in a barber

shop. And I explained my problem, that we had this problem with Safeway, and apparently they would like an additional discount off the price, of a nickel a case.

Mr. Halvorsen made quite a remark to me. He said, "Hell, this is a fine time to show up with a problem like this." He says, "It's Friday evening." He says, "It is after five o'clock. The main office is closed and the trucks are being loaded. Now what do we do?"

I told him that I didn't know what we should do. So we discussed the thing. We didn't know what—really what to do about it. We didn't want to ship them, and yet we didn't want to lose the business, because we had never had any business with Safeway before.

So he said, "Well, you call Walsh again and see what you can work out with him and then you contact me a little later."

And in the meantime I had received an order from the American Food Stores, a Mr. Elmer Degenhardt. So I called Mr. Degenhardt and I told him that I understood that competition was offering a lower price than he had bought pies for from me, that we had this order on file in Watsonville and if he so desired I would be happy to cancel it.

He informed me that he knew that there was a lower price in the market, but that he had given me the order and that he expected me to deliver the merchandise.

[fol. 165] In the ensuing time I finally contacted Halvorsen again. We decided that neither one of us could make a decision on prices, and we were afraid that Safeway couldn't live with this situation, so he had the trucks unloaded and the merchandise put back in the storage.

And I called Mr. Walsh at his home and I told him, I said, "I am sorry, we couldn't do anything about this and we decided to unload the trucks and put the merchandise back."

And he suggested that I call Mr. Henzke, which I subsequently did, and he said he was extremely sorry that we had cancelled the orders, that he didn't mean it quite that

way; however, that it probably was a good thing because he had a large inventory on Swiss Miss and he would advertise those the coming weekend. And he suggested that I come back to see him the next week and we would discuss the Morton problem again.

Q. Did you subsequently go back to see Mr. Henzke and discuss the Morton problem, sir?

A. I went back and talked to both he and Mr. Walsh on a Tuesday. And he gave me another order of 7,500 cases of pies to be delivered into Salt Lake.

Q. And those are the pies that were delivered on a common carrier paid for by Morton?

A. That's correct.

Q. And then, a subsequent order was received from Safeway; is that correct?

A. Yes. I received another order for a like amount.

Q. And on what basis was that order?

A. That was f.o.b. Watsonville.

Q. Mr. Alioto asked you, sir, whether or not that order was picked up in Safeway's trucks, and I wondered if you knew if it was or not.

A. I think it was picked up by Dunkley Distributing.

Q. By a common carrier?

A. By a carrier that was doing business with Safeway, yes.

Q. And Safeway paid Dunkley; is that correct?

A. Safeway paid them, yes.

Q. So far as you know?

A. Yes.

Mr. Alioto: Counsel said "common carrier."

The Court: Well, "so far as you know" means you don't know, doesn't it?

The Witness: I'm sorry. How did I answer?

[fol. 166] The Court: You said, "So far as I know." I never know what that means.

Mr. Schafer: That means I don't want him to answer, your Honor—

The Court: Well, now, never mind. I'm talking to the witness now. When you said, "So far as I know," did you

mean to say you didn't know, or did you mean to say you did know?

The Witness: That two truckloads of pies were picked up by Dunkley.

By Mr. Schafer:

Q. Do you know who paid Dunkley to transport them?

A. Safeway paid the freight.

Q. How long, Mr. Chapman—let me start over by saying—do you know, Mr. Chapman how long 7,500 cases of apple pies lasted Safeway?

A. Well, I'd say pretty close to three weeks. I think that 15,000 cases lasted roughly five to six weeks.

Q. So that these two sales that you made to Safeway so far as you know lasted Safeway six weeks?

A. That's right.

Q. And your testimony was, if I understood it correctly, that Safeway in order to accept your pies had to clear its warehouse of Swiss Miss pies?

A. That's correct.

The Court: Now, this is repeating the testimony.

Mr. Schafer: I'm sorry.

The Court: It's been made very plain.

Mr. Schafer: I wasn't sure I understood him.

By Mr. Schafer:

Q. Do you know, Mr. Chapman, who authorized your $2.85 price in June of 1961?

A. Mr. Halvorsen.

Q. Do you know from whom he received his authorization?

A. I assume from the main office in New York.

Q. Do you have any reason to believe that Mr. Vail had anything to do with it?

A. I don't think so.

Q. Mr. Alioto, sir, identified your offers to these various customers of the $2.85 price in Salt Lake City as negotia-

tions; and my question to you is whether or not you meant by accepting, impliedly accepting his characterization, that there was any negotiation involved on this offer to these various stores or distributors.

A. It was merely an offer.

[fol. 167] Q. Explain to us, if you would, please, what "merely an offer" means. How do you operate as a salesman with merely an offer?

Mr. Alioto: Ask him what was said or done in connection with anything.

Mr. Schafer: I'm trying to ask him what he meant by "merely an offer."

The Witness: I go into the buyer. Take for instance Safeway. And I have a *presenation*. I have their form, and I pull it out showing the exact price that we are offering, the freight allowance, if there is one, f.o.b. the Watsonville plant, in this particular instance; and that's about all there is to it.

By Mr. Schafer:

Q. Is there any negotiation involved?

A. Well, I don't know what you mean by "negotiation."

Q. Is there anything more involved, Mr. Chapman, than a straight offer?

The Court: Don't lead him.

Mr. Schafer: I don't think this is leading.

The Court: It started out like it was going to be. I don't want you to lead him.

Mr. Schafer: This is a yes or no question.

Mr. Alioto: That's the definition of a leading question sometimes.

Mr. Schafer: I really don't want to lead him. I'm trying to comply. I don't think this is leading.

The Court: I know you have some difficulty asking those questions, and I'm not going to be too hard on you, unless you keep doing it. How much more examination do you have of this witness?

Mr. Schafer: I would say probably three-quarters of an hour.

The Court: All right.

• • • • • • • •

[fol. 168] Q. Mr. Chapman, when we closed yesterday I was about to discuss with you the concept Mr. Alioto inquired about as to the lowering of the market, as I recall it, in June of 1961, in the Salt Lake market. You got two orders from one customer, and your offer was lasting for about two or three weeks, according to the record.

Now, if such an order, Mr. Chapman, would cause a lowering of the market, did you mean to say it would be a general lowering of the market?

A. No. It would be strictly for just a temporary period, two-to-three-to-four-week period, whatever it would take to move the pies out.

Q. When you offer, or when any competitor offers, a two-or-three-week promotional allowance, do the other competitors reduce their price always?

A. Not necessarily. Sometimes they might meet the situation for just a week or two, and then other times they would just let it go by.

Q. Those that do reduce their price do not reduce their price on a permanent basis, is that correct?

A. Strictly temporary.

Q. As to the June, 1961 period, Mr. Chapman, was there a lowering of the retail price in the market, the retail advertised price, if you will?

A. Yes, there was a lowering of the retail advertised price. On the same week that our pies—I am referring to Morton pies—were advertised at three for 79 cents, the Frost 'N' Flame, the Utah pie, was advertised, that is, Associated Foods, four for a dollar.

Q. The same week, you said?

A. The same week, yes, sir.

Q. That would be the same Thursday, is that correct?

A. Yes.

Q. Do you know whether or not, Mr. Chapman, in June of 1961 the Utah Pie Company lowered its price generally when you reduced your price to $2.85?

A. Yes, they did.

• • • • • • • •

[fol. 169] Q. I refer you again, Mr. Chapman, to Exhibit 4, which you saw yesterday. Customer No. 5, Mr. Chapman, I will inform you, is the Utah Wholesale Company. Can you look at Exhibit 4 and tell the jury when the last price was quoted to Utah Wholesale by the Utah Pie Company of $2.75.

• • • • • • • •

By Mr. Schafer:

Q. What was the last price you see quoted to Utah Wholesale, Mr. Chapman, of $2.75 on the apple pie, Utah Pie brand?

A. The last date was August 5.

Q. What is the first date on which the Utah Pie Company sold Utah Wholesale its Utah Pie brand at 3.50?

A. August 11.

Q. So that whatever lowering of price by the Utah Pie Company to Utah Wholesale was over by August 11 of 1961?

A. Yes.

Q. Looking at Customer No. 2, Mr. Chapman, when is the last price quotation you find under Customer No. 2, which is Associated Frozen Foods, of the $2.75 price?

A. August 31.

Q. What was the first price at which the Utah Pie Company increased its price to Associated Frozen Foods to $3.60?

A. September 13.

Q. Thank you. Again in relation, Mr. Chapman, to this concept of lowering this price—you have been in this market for a good many years—did any one particular company lower the price consistently through these years?

A. Yes.

Q. Was any one particular company consistent in the low price manufacture in this market?

A. Yes.

Q. What company was that?

A. The Utah Pie Company.

Q. When did they start lowering their price, if you can recall?

A. I believe in 1958 or the forepart of '59.

Q. Is it your testimony they were lower than the general level of competitive activity in 1958?

A. Yes.

Q. Do you know of any competitive activity which would cause them to lower their price?

[fol. 170] Mr. Alioto: I submit, if your Honor please, it calls for the opinion and conclusion of the witness on factual matters that can otherwise be reached.

The Court: Sustained.

By Mr. Schafer:

Q. Putting aside, Mr. Chapman, the temporary two-or-three-week promotional allowances offered by the competitors in this market, has any competitor in this market offered as low a price as Utah Pie Company?

Mr. Alioto: I submit, if your Honor please, that is a matter of record.

The Court: Sustained.

Mr. Alioto: This man has no way of knowing that.

The Court: Sustained.

Mr. Schafer: He has been in the market a good many years.

By Mr. Schafer:

Q. We talked yesterday, Mr. Chapman, about the Frost 'N' Flame brand. I want to make sure we know what that is. Who produces the Frost 'N' Flame brand?

A. Utah Pie Company.

Q. As I understand it, the Frost 'N' Flame brand was purchased by the Associated Frozen Foods.

A. That is correct.

Q. And you were the buyer for Associated Frozen Foods at the time it was first purchased.

A. That's correct.

Q. Do you recall when the Frost 'N' Flame brand was offered to you as buyer for Associated Frozen Foods?

A. February, I believe, in 1960.

Q. Who suggested that arrangement, Mr. Chapman?

A. Mr. Rigby.

Q. You did not ask him for this brand?

A. No, sir.

Q. What price did he quote to you, do you recall?

A. Three dollars on apple pies. Three dollars a dozen.

Q. What was the general prevailing price, if you know, that you were buying at at that time, February of 1960?

A. I think about sixty cents a dozen more money.

Q. You were buying from the Utah Pie Company at sixty cents more?

A. Yes.

Q. Then you were buying from other competitors? How much more?

[fol. 171] A. I think between fifty and sixty cents a dozen. Somewhere. I'm not positive.

Q. Did the Utah Pie Company make any representation as to the size and the quality of the Frost 'N' Flame brand?

A. The size was to be a 24-ounce pie, and the quality was to be the exact same quality as the Utah label.

Q. Was it your understanding that you were buying the same pie at $3.00 that you were formerly buying at $3.60, but under another name?

A. Yes, sir.

Q. Did you have an exclusive arrangement on the Frost 'N' Flame brand?

A. Yes. There was our label to use and the area that our company served.

Q. No other customer?

A. No other customer had access to that label in that area.

Q. Could any other supplier compete with the Utah Pie Company for the business represented by the Frost 'N' Flame?

Mr. Alioto: Your Honor please, I submit it calls for the opinion and conclusion of the witness.

The Court: Sustained.

By Mr. Schafer:

Q. Did the Utah Pie Company own the Frost 'N' Flame name, Mr. Chapman?

A. Yes, it did.

Q. Mr. Chapman, when you were a buyer with Associated Frozen Foods, would you have been willing to switch the business from the Frost 'N' Flame name, the business of Associated Frozen Foods, from the Frost 'N' Flame to another brand name without a substantial price difference?

A. No, because we not only had an excellent price; we had a low price, and it was an everyday price, and we had also advertised it, and we had an investment in the label.

Q. Can you tell the jury what you mean, sir, by an investment in the label?

A. Well, let's say that we had promoted the Frost 'N' Flame pie in advertising, advertising in the newspapers, over radio, and that type of medium. In other words, we had developed a franchise for that name.

Q. Do I understand you to testify that you had invested advertising money in the Frost 'N' Flame name?

A. Yes.

Q. When you were now a buyer, Mr. Chapman, with Associated, can you recall that you had ever received an offer of $3.00 for a dozen apple pies from any other supplier of frozen fruit pies?

A. No.

[fol. 172] Q. Had you ever heard of anybody else being offered such a low price?

A. No.

Q. Again thinking of yourself as a buyer, Mr. Chapman, would you have been induced to switch your Associated business from the Frost 'N' Flame name to the Morton name on the basis of a temporary two or three week price promotion allowance?

A. No, I would have had—have had a much better price and a guaranteed price for a considerable length of time.

Q. Did the price that you received, the $3.00 price that you received, from the Utah Pie Company give your retailer members a substantial competitive advantage?

A. Yes, it did. It gave us an advantage, in that we could make considerably more profit by handling the Frost 'N' Flame label, and it gave us a considerable advantage, because we could advertise it at a greatly reduced cost.

Q. Were you able to advertise it at retail at a price lower than anybody else's brand was being advertised at retail—

A. Yes.

Q. —if you wanted to?

A. Yes.

Q. In terms of the nature of the Associated organization, Mr. Chapman, was it possible for other retail stores if they chose to to buy the Frost 'N' Flame brand even if they weren't members?

A. Yes. It was available.

Q. You testified, Mr. Chapman, yesterday to Mr. Alioto that you, in respect of this $2.85 price in June of 1961, that you identified that price, if my notes are correct, as a very, very good price.

A. Yes. I used that as a—

Q. I haven't asked a question yet, sir. Please let Mr. Alioto have a chance to object. My question to you, sir, is what did you mean by that testimony?

A. Well, it was a salesman's pitch, as you might say, to indicate to the customer that it was certainly a great deal better offering than I had been coming around with.

Q. Did you think you had a competitive price?

A. Yes.

Q. You testified yesterday, Mr. Chapman, that you had a better list price here than in California? Morton had a

better list price—I'm sorry—in California than it had in Salt Lake City at the time of June, 1961. And my question to you is whether or not, Mr. Chapman, the list price which you were shown yesterday reflects—always reflects—the offering price of the Morton Company so far as you know?

A. No, it reflects no offering. It's strictly a list price.

Q. What other documents would be available to reflect an offer made by the Morton Company to the trade?

[fol. 173] A. Well, normally a supplement or broker's bulletin.

Q. Do you get, Mr. Chapman, in the ordinary course of your business these supplements for the California prices and the brokerage bulletins?

A. No, sir. I only get the one from my area.

Q. In June of 1961, Mr. Chapman, would you have had any way of knowing what the price was that Morton was offering his pies at in San Francisco or Los Angeles?

A. No, I did not.

Q. You testified, sir, if I recall correctly, that the purchases of the two orders of Safeway in June of 1961 last Safeway about four—I think, five or six weeks, you say?

A. Yes.

Q. And my question to you, sir, is how do you know that?

A. Well, because the advertising during the period, and they were just about out at the end of that time.

Q. Do you recall how many advertisements there were of your brand in that period?

A. I believe there were four.

Q. Do you recall, sir, whether or not the advertisements of your brand were reduced in price to meet the price at retail that the Utah Pie Company brand was being offered at? In other words, you said it was four for a dollar?

A. Yes. Safeway started out. Their first ad was three for 79 cents, and I believe their next three ads were four for a dollar.

Q. The second Safeway ad would have been at four for a dollar; is that right?

A. Yes.

Q. And that was after the first Utah Pie brand ad at four for a dollar?

A. Yes.

Q. One week after? Is that correct? Mr. Chapman, did you expect when in offering your $2.85 price that you would force the Utah Pie Company down to a lower price for its heavier pie?

A. No.

Q. Can you tell the jury and the Judge, Mr. Chapman, why you did not think that that would have that effect?

A. Well, because it was strictly a spot offering; it was only good for just a few weeks. And besides that, the Utah Pie Company pack a 24-ounce, and I didn't see any need for them to reduce their price.

Q. You identified, Mr. Chapman, a Mr. Sid Boone yesterday in Mr. Alioto's examination. My question is simply, would you identify for the record who Mr. Sid Boone is?

A. I believe his title was the merchandise buyer for the Grand Central Markets.

Q. And you testified, I think, am I correct in recalling, that it was Mr. Sid Boone who indicated to you that the Grand Central was negotiating for another private label pie?

A. That's correct.

[fol. 174] Q. And it was he that indicated the price would be a price competitive with the Frost 'N' Flame brand?

A. He indicated it would be cheaper.

Q. Both of those pies are produced by the Utah Pie Company?

A. That's correct.

Q. Can you identify for us, Mr. Chapman, who—as I understand your testimony yesterday, you identified about four customers who account for about ninety per cent or so of the business here in the market. I wonder if you can identify for us who the customers are who make up the other ten per cent of the market.

A. They would be Booth Fisheries, Chase's Ice Cream, Northern Sales, and I believe Great Western Distributing. Small distributors.

Q. Do you offer to sell or try to sell to those distributors, Mr. Chapman?

A. No, I do not, because the smallest amount of product that I can sell is a quarter of a truckload, and they're just not sufficiently in the business to handle that many cases.

Q. So that in June of 1961 when you were offering your $2.85 pies in this market, you did not, as I understand it, you did not make that offer to the smaller distributors; is that correct?

A. That's right.

Q. Because they were not your customers?

(Witness nods head.)

• • • • • • •

By Mr. Schafer:

Q. The Utah Pie Company's Frost 'N' Flame brand was the lowest priced pie on the market; is that correct?

A. Yes.

Q. In your judgment at that time, Mr. Chapman, could the Morton Company have sold its pies at a price higher than $3.00?

A. No.

Q. In your judgment, Mr. Chapman, could the Morton Company have sold its pies at a price higher than $3.10 in 1961?

A. No.

Q. How was your business in 1962 on fruit pies?

A. Our business in 1962 has been extremely poor. My volume is about 30 per cent of my sales as against 1961.

Q. Can you account for that decrease in sales?

A. I don't have a price to meet the situation.

Q. What do you mean by "meet the situation"?

A. I don't have a price that I can sell to the buyers that will meet the Utah Pie Company price.

Q. What is the Utah Pie Company's price on its apple pies?

[fol. 175] A. $2.90 a dozen.

Q. Has it been that price all year long?

A. Yes, it has.

Q. Do you know of any reason—I take it, Mr. Chapman, that that's the lowest priced pie on the market?

A. That's my understanding, yes.

Q. From your knowledge of the market during 1962, Mr. Chapman, do you know of any reason why it was necessary for Utah Pie Company to price its pies that low?

A. No, I do not.

Q. Have you tried to meet that price with your Morton pies?

A. No.

Q. What have been, Mr. Chapman, the prices for the Morton apple pies during 1962?

A. We have had a couple of temporary price declines, and I believe that we did—I believe one of them was $3.00 a dozen delivered on apple pies.

Q. And how long did that last?

A. I believe either a two or three week period.

Q. Is it your testimony that outside of a two or three week period, your price has been what?

A. Back to our regular list. Four dollars.

Q. You testified that you have not tried to beat the Utah Pie brand's prices. I wonder why not? Can you tell us?

A. Well, if we met the Utah Pie Company's price of $2.90, on an ounce per ounce basis, our pie would be roughly about $2.64; and I felt that Morton Company would not go along with this thing, and I have never suggested it.

Q. You felt that they would not go along with a $2.64 price?

A. That's right.

Q. Do you have any reason for not having felt that way?

A. Well, I think if we had, possibly the Utah Pie Company would have come in at a lesser price.

Q. Why do you think they would have done that?

A. Well, because they did that on the previous—the time when we were in at $2.85.

Q. In your judgment, Mr. Chapman, would a $2.64 price be a better price than the Utah Pie Company's price at $2.90?

A. No, it wouldn't be the same comparable price.

Q. At a price of $2.64, Mr. Chapman, would that be available to a customer in any quantity?

A. No. Only in truckload lots.

Q. So far as you know, is the Utah Pie Company's $2.90 price available in any quantity to a customer?

A. In any quantity.

Q. From your experience as a buyer, Mr. Chapman, is that a substantial competitive advantage for the Utah Pie Company?

A. Yes. It enables the various small buyer to buy very limited amounts of merchandise at a low price.

[fol. 176] Q. You testified, Mr. Chapman, in connection with this Sid Boone colloquy that there were negotiations for a private label between the Utah Pie Company and Grand Central Stores? My question to you, did those negotiations ever come to fruition?

A. Yes, it did, and they began to handle the Mayfresh label.

Q. Could you, Mr. Chapman, in your own words explain to the jury what we mean by "private label"? We've been using that term, and I'm not sure we all understand it.

A. Well, "private label" is a label that's given exclusively to one distributor or one wholesaler. It's for his own use, and no one else can participate in the use of that label.

Q. And the Grand Central Stores started buying the Mayfresh label, I think you testified, from the Utah Pie Company. Does anybody else buy the Mayfresh label, Mr. Chapman?

A. The American Food Stores in Ogden. They are a—American Food Stores and the Grand Central Markets are

a division of Mayfair Food Stores. They're both the same chain.

Q. So that's why two different store names can buy one brand name?

A. That's correct.

Q. Now, the American Food Stores are purchasing the Mayfresh label?

A. That is right.

Q. Has that had any effect upon your business, Mr. Chapman, with American Food Stores?

A. Yes. I was kicked out.

Q. Did you ever, Mr. Chapman, in your days as a buyer, did you ever pay as much for a 22-ounce pie as you did for a 24-ounce pie?

A. Never.

Q. Why not?

A. Well, because a 22-ounce pie is just a smaller pie. It's just not economically sound to pay more for less.

Q. And is Morton a 22-ounce pie?

A. Yes, it is.

Q. And is Utah Pie a 24-ounce pie?

A. Yes, sir.

Q. And would you have been willing as a buyer to have purchased a Morton Pie at the same price as the Utah Pie Company price?

A. No.

Q. Did you ever in your days as a buyer, did you ever have a smaller pie over—were there smaller pies on the market than a 24-ounce?

A. Yes.

Q. When these pies were offered to you, these smaller pies, Mr. Chapman, how did you figure out whether or not the price was a good price or a bad price?

A. We compared it on an ounce per ounce basis.

• • • • • • •

[fol. 177] Q. You identified for Mr. Alioto the four major customers in 1961. How many of those four major customers in 1961, Mr. Chapman, did the Utah Pie Company have substantial business with?

A. I believe in two.

Q. Can you identify those two?

A. Associated Frozen Foods and Utah Wholesale.

Q. Now, looking at the situation in 1962, what is the picture in terms of the Utah Pie Company business with the four major customers in the market?

A. Well, they have a great amount of business now with Safeway and, of course, I was displaced at American Food Stores, so now they have a great amount of business in American Food Stores.

Q. Have they retained their position with Associated Frozen Foods?

A. Yes, they have.

Q. Have they retained their position with Utah Wholesale?

A. Yes.

Q. So that your testimony is that, so far as you know, they have a substantial position with those four major customers?

A. Yes.

Q. I wasn't sure yesterday, Mr. Chapman, that we made it clear what the difference is in this market between what we call the promotional allowance or billback or advertising allowance, between that situation and a temporary price cut or price reduction. Can you identify for us, Mr. Chapman, if there is any difference between those two situations, looking at it from the seller's side of the fence, if you will?

A. It is actually the same thing. It is to get people to advertise. It is a price decline, except that in this State we cannot use that. We have to have a price taken off of the invoice because of the selling law that we have in effect.

Q. So, if I understand you correctly, when a customer gets a promotional allowance, that does not show on the

face of the invoice, so that he has to charge 6 per cent above that invoice price, is that correct?

A. Correct.

[fol. 178] Q. And that invoice price is a higher invoice price than the situation where you have given a temporary price discount, is that correct?

A. That is right.

Q. And is that situation with respect to the Utah State law, is that the only situation creating a difference between the temporary price decline and the promotional allowances?

A. Yes.

Q. During the time, Mr. Chapman, the 14 months that you have been associated, through 1960 and 1961, with the Morton Company, as a broker, have you ever had to pay any spoilage claims?

A. No, sir.

Redirect examination.

By Mr. Alioto:

Q. Mr. Chapman, just a very few questions and we will conclude.

Counsel asked you about your prices and business in the year 1962. It is a fact, is it not, Mr. Chapman, that in the year following the filing of this complaint that your prices were generally higher than they were in the immediate period preceding the filing of this complaint?

A. Yes.

Q. And approximately how much higher were they after this complaint was filed?

A. Fifteen cents a dozen.

Q. Did you ever, in 1962, for example, have a 2.55 price?

A. No, sir.

Q. Did you have a 2.85 price in 1962?

A. No, sir.

Q. What is the highest price you had in 1962 for the very same pie you were selling at 2.55 before this complaint was filed?

A. Four dollars.

Q. Four dollars?

A. Yes.

Q. In other words, after the complaint was filed you had a $4 price here in Salt Lake City?

A. Yes, we had a $4 price off and on.

Mr. Schafer: Your Honor, may I state an objection to this line.

The Court: Surely. Go ahead.

Mr. Schafer: If the line of interrogation is intended to develop the point that the Morton Company has raised its prices because this complaint was filed, this witness is not competent to testify to that. He has no power to fix the prices of the Morton Company.

[fol. 179] Mr. Alioto: You raised the question about his 1962 prices. I didn't. So I am examining him about what he charged in 1962.

Mr. Schafer: It has no relation to the date of the complaint. He has no pricing power.

The Court: Objection overruled.

Mr. Schafer: He is asking for why Morton priced them as they did.

The Court: Overruled.

By Mr. Alioto:

Q. Do you have a man named Dick Horton who works for you?

A. Yes, sir, I do.

Q. Is he a salesman in your organization, Mr. Chapman?

A. Yes, he is.

Q. Have you ever had any discussion with Mr. Horton about the effect of this lawsuit on the pricing of Morton?

A. Would you repeat that again?

Q. Have you ever heard Mr. Horton say, in substance or effect, that "We have to stay under wraps so long as this lawsuit is on, and as soon as it is over we will be able to deal and wheel a little better"?

A. No, sir.

Mr. Schafer: If Your Honor please, that is clearly inadmissible. What the employee of Mr. Chapman may have said about Morton's pricing policy clearly is not admissible, your Honor.

Mr. Alioto: You asked about his 1962 prices.

Mr. Schafer: I didn't ask anything about what Mr. Horton said about it.

The Court: Overruled.

By Mr. Alioto:

Q. Does Mr. Horton contact the trade here in Salt Lake City?

A. Yes, sir, he does.

Q. Have you ever had a discussion with any official of the Morton Company about the effect which this lawsuit has had upon Morton's prices in this area?

A. No, sir.

Q. Now, in connection with prices prior to the filing of this lawsuit, would you be good enough to tell the Court and jury, Mr. Chapman, what the expression on the Morton [fol. 180] invoice, which is part of Exhibit 14 in this case, the expression "ppd" means on the invoice in the lefthand corner?

A. I don't know what that means, sir.

Q. You don't know whether it means "prepaid"?

A. No.

Q. Well, let me ask you whether, in the light of your business experience, you know what "prepaid" on any invoice means?

A. It normally means prepaid freight.

Q. And it normally means, does it not, that the freight was prepaid by the seller?

A. Yes.

Q. So if this invoice carries the normal meaning, it would mean, would it not, that on this shipment of apple pie at 2.89 in Salt Lake City the freight was prepaid by the seller, namely, the Morton Company?

Mr. Schafer: Now, your Honor, he has testified he didn't know. Now he is just being asked to guess.

The Court: How about that?

By Mr. Alioto:

Q. Do you know?

A. Yes, I know.

Mr. Schafer: I am sorry. I thought he just testified he didn't know. I am sorry.

A. This invoice is to Associated Food Stores in Pocatello.

By Mr. Alioto:

Q. Yes.

A. And every shipment that I sold to those people was prepaid from—prepaid to their dock.

Q. To their dock?

A. Yes, sir.

Q. So that means that the Morton Company paid the freight to their dock?

A. Yes, sir.

Q. In Ogden?

A. In Pocatello.

Q. In Pocatello, yes. Now, would that also be so on the "prepaid" which appears on Exhibit 14, made out to Grocers Wholesale in Salt Lake City, Utah, f.o.b. prepaid. Does that mean exactly the same thing?

A. No, sir. Because these people picked it up with their own equipment at Watsonville.

Q. Then "prepaid" means something different, does it, in that sense?

A. I do not know what "ppd" means.

Q. Okay. When counsel was interrogating you, Mr. Chapman—excuse me. Before we leave this price matter, I take it since you charged $4 in 1962 that you believed that that was a fair market price.

A. No. We charged $4 in 1961, too.

Q. But I take it you believed the $4 for 1961, as well as for 1962, was a fair market price.

A. No, it was not.

[fol. 181] The Court: What was the answer?

Mr. Alioto: "No."

By Mr. Alioto:

Q. Why did you charge a price that you didn't think was a fair market price?

A. That was the price that was given to me by Morton.

Q. Well, did Morton ever suggest to you that their prices in the market were not fair?

A. That's right.

Q. They did not?

A. We had several temporary price declines during 1962.

Q. I am saying, did the Morton Company ever suggest to you, in connection with its pricing, that it was not offering fair prices in this market?

A. No.

Q. Now, on the matter you were discussing with counsel about the buyers in this area, would you be good enough to look at a list which we secured from the Pet Milk Company, just run over that list, and state whether or not you are generally familiar with the group of buyers set out in that document.

A. With the group?

Q. With the buyers set out in that document. Do you know them?

A. No, I do not.

Q. Well, let's go down the list and see about that. Do you know the IGA Stores in Salt Lake City?

A. Utah Wholesale Frozen Foods is buyer for IGA Stores.

Q. But you do know they exist in Salt Lake City?

A. Yes.

Q. Do you know the AG Stores in Salt Lake City?

A. Yes.

Q. Do you know the Albertson Stores in Salt Lake City?

A. Yes.

Q. Do you know the IGA Stores in Pocatello?

A. Yes.

Q. Who buys for them?

A. Idaho Wholesale.

Q. Do you know the Albertson Stores in Pocatello?

A. Yes.

Q. Who buys for them?

A. Albertson Distributing in Boise.

Q. Do you know the IGA Stores in Twin Falls?

A. Yes.

Q. Who buys for them?

A. Utah Wholesale.

Q. Do you know the 79 Buttrey Stores (spelling) B-u-t-t-r-e-y, in Great Falls, Montana?

A. No, sir.

Q. Never even heard the name?

A. Yes, I do. I have heard the name.

Q. Who buys for them?

A. I don't know.

Q. Do you know the AG Stores in Helena, Montana?

A. Yes.

Q. Associated Grocers.

A. Yes.

Q. Who buys for them?

A. Do you want the individual's name?

[fol. 182] Q. No. The organization.

A. AG in Helena.

Q. That is Associated Grocers?
A. Right.
Q. In Helena. Do you know the AG Stores in Boise?
A. Yes.
Q. Who buys for them?
A. AG in Boise.
Q. Do you know the Albertson Stores in Boise?
A. Yes.
Q. Well, there is a longer list.

Mr. Alioto: We will put this in evidence, if your Honor please, offer it in evidence.

(Plaintiff's Exhibit No. 20 was thereupon marked for identification.)

• • • • • • •

(Document marked Plaintiff's Exhibit No. 20 for identification was received in evidence.)

Mr. Alioto: If I may just simply indicate, if your Honor please, to the members of the jury. This is a list of a group of stores in what is called the Salt Lake Division of the Pet Milk Company and lists some 1,238 stores by name and by number within the group.

By Mr. Alioto:

Q. One last thing, Mr. Chapman: Counsel interrogated you about the fact that the Utah Pie Company had a competitive advantage in this area because it was able to deliver small lots to individual purchasers, and Morton was not.
A. Correct.
Q. That competitive advantage arises from no other fact [fol. 183] than the fact that they are located in this area, their plant is here, that is correct, is it not?
A. Yes.

• • • • • • •

By Mr. Alioto:

Q. Let me put it this way, one last question: You will agree with me, will you not, in the light of your business experience, that the only competitive advantage that the Utah Pie Company has in this area with respect to small shipments is a competitive advantage which arises from its natural location and that the other companies in this case have that same advantage wherever they are located?

A. Yes.

Mr. Alioto: We have no further questions.

Recross examination.

By Mr. Schafer:

Q. In your experience in the industry, Mr. Chapman, do manufacturers usually make quantity breakdowns for shipments?

A. Yes.

Q. In other words, they quote prices on various quantity lots, is that right?

A. Yes.

Q. Do you know of any manufacturer in the industry, Mr. Chapman, who offers one price, never mind whether you buy a thousand dozens or one dozen?

A. Yes, the Utah Pie Company.

Q. Do you know of any other manufacturer that does that?

A. No, I don't.

Q. I should like to show you, Mr. Chapman, Plaintiff's Exhibit 20, which was just introduced into evidence, and ask you to read off for us of the twenty or so stores, or groups of stores, listed there how many of those names you identify as being within the Salt Lake City marketing area.

A. The IGA Stores, AG, and Albertson's.

Q. So that of the 20 or 25 stores listed on this list, your testimony is that only three of them are located within the Salt Lake City marketing area?

A. Yes.

Q. I take it Denver is not in the Salt Lake City marketing area?

A. That is correct.

Q. Is Longmont, wherever that is? Do you know where it is?

A. No, I don't know where that is.

Q. Or Grand Junction?

A. I assume in Colorado.

Q. Pueblo?

A. Colorado.

Q. Spokane, Washington, is that in the Utah marketing area?

A. No.

[fol. 184] Q. Now, in respect to the three stores, or groups of stores, listed here that are within the Salt Lake City marketing area—you have named them as IGA, AG, and Albertson's—how many buyers do those three names represent?

A. They represent two buyers.

Q. AG, I take it, is a buyer?

A. That's right.

Q. A buyer, I should say, from the manufacturer?

A. Yes, sir.

Q. Albertson's is not a buyer from the manufacturer?

A. No.

Q. How does Albertson's buy?

A. Albertson's buy their merchandise from Utah Wholesale.

Q. How does IGA buy?

A. From the same source.

Q. So that of this list of 25 or so names we have only two buyers within the Salt Lake City marketing area?

A. Yes.

Q. You testified that Morton's apple pies had been reduced in price in 1962 on only several occasions, I think you said.

A. That is right.

Q. What does that mean, two or three, or what does that mean?

A. I believe two.

Q. Do you recall to what price the Morton's price was reduced in 1962?

A. Three dollars.

Q. Three dollars?

A. Three dollars.

Q. And for how long a period of time?

A. Two to three weeks.

Q. And that was after the date of the complaint?

A. Yes, it was.

Q. Has Morton reduced its peach prices in 1962?

A. No, sir.

Q. Has the Utah Pie Company reduced its peach prices in 1962?

A. Yes.

Q. To what level?

A. $2.90 a dozen.

Q. Do you know of any reason, from your experience in the market, why the Utah Pie Company would have had to reduce its price to $2.90 on peach pies?

A. No, sir.

Q. Am I correct in understanding that the Utah Pie Company's price of $2.90 on peach pies was the lowest price on peach pies in the Salt Lake City market?

A. Yes.

Q. Has Morton reduced the price of its cherry pies?

A. No, it has not.

Q. Has the Utah Pie Company reduced the price of its cherry pies?

A. Yes.

Q. To what level?

A. $2.90 a dozen.

Q. Do you know of any other competitor in the marketing area that reduced its prices to an equivalent level?

A. No.

Q. Do you know of any reason, from your experience in the market, why the Utah Pie Company would have had to reduce its price on cherry pies to $2.90?

A. No.

Q. I think you testified that the Utah Pie Company [fol. 185-186] makes four flavors of fruit pies—I'm sorry, I think you said five flavors.

A. I said apple, cherry, boysenberry, peach, and blueberry.

Q. So that on three of those five flavors the Utah Pie Company now is quoting prices of $2.90?

A. That's correct.

Q. And on none of those three flavors do you know of any reason why they would have had to do so in terms of competitive activity in the market place.

A. That is right.

Q. When the Morton Company, Mr. Chapman, has a list price of $4 on its, say, apple pies, what does that mean? I'm sorry, you may not understand my question. I take it that the way you sell pies in this market is: You offer some sort of an inducement off the list price in order to get the retail stores to advertise your product, is that correct?

A. That is correct.

Q. So that when you are quoting a $4 price, am I correct in understanding that that simply means you haven't got some sort of a temporary, two or three week, price allowance offered in the market place?

A. That is correct.

Q. Am I correct in understanding that when the Morton Company is simply quoting its list price, that really isn't a realistic offer, is that right?

A. That's right.

Q. Four-dollars is way above the marketing level in this market, is that correct?

A. That is correct.

Q. Do you try to sell Morton fruit pies when they are simply quoted at list price?

A. No.

Q. Does that mean you don't go around in the trade and try to induce them to buy at $4?

A. I would be foolish to do that. I don't.

Q. Tell us why.

A. Because I would be completely out of line. I would be too high.

[fol. 187] GRANT R. CALDWELL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Caldwell, would you be good enough to state your full name for the record?

A. Grant R. Caldwell.

Q. And where do you reside, Mr. Caldwell?

A. Salt Lake City, Utah.

Q. What is your business or occupation?

A. I'm a certified public accountant.

Q. And where do you have your business office in Salt Lake City?

A. 321 First Security Building.

Q. What is the name of your firm?

A. Caldwell, Nielson, Campbell & Company.

Q. For how long a period of time have you been an accountant?

A. Thirteen years.

Q. What is your professional training?

A. Graduate from the University of Utah, Major in accounting.

Q. Mr. Caldwell, at our request have you made an examination of various books and records and documents which have been produced by the defendants in the course of discovery proceedings in this litigation?

A. Yes, sir.

Q. And in that connection have you also visited the offices of any of the defendant companies to look at certain records of the defendant companies?

A. Yes, sir.

Q. Would you generally state for the record—and do this generally, rather than specifically, at this moment—the nature of the business records to which you have been given access?

A. It's been primarily confined to operating statements which the company has prepared in the ordinary course of business, pricing lists, certain invoices, and other accounting studies prepared by the defendants in their offices in the ordinary course of business.

Q. Now, from this material have you made certain studies setting forth the profits and losses of the various defendant companies in the Salt Lake Division, as contrasted with the other divisions in which these companies operate?

A. Yes, sir, as nearly as the allocation or the breakdown can be made or was made available.

Q. Okay. I want to invite your attention, Mr. Caldwell, to Plaintiff's Exhibit 21 for identification, which has been marked for identification but is not yet in evidence. Would you be good enough to explain to the Court and the jury [fol. 188] generally what that exhibit is?

A. This is for defendant Pet Milk Company. It indicates the operating results or the profit and loss in the Salt Lake Division, the San Francisco Division, and all divisions for the years 1958 and 1959.

Q. From what sources was this document prepared, Mr. Caldwell?

A. This was prepared from the company's own statements.

Q. And a copy of this has been in the possession of the defendant companies for some time, has it?

A. Yes, sir.

Q. Would you have made this available to their auditors?

A. Yes, sir.

Mr. Alioto: We'll offer this in evidence, if your Honor please.

Mr. Lamb: No objection.

(The exhibit marked Plaintiff's Exhibit No. 21 for identification was received in evidence.)

Mr. Alioto: This exhibit, ladies and gentlemen, sets out for the Pet Milk Company on the first page a summary of operations of frozen fruit pies in 1958 and 1959, first for the Salt Lake City Division, then the San Francisco Division, and third, all sales divisions.

By Mr. Alioto:

Q. Now, would you be good enough to make a general statement, Mr. Caldwell, as to what is contained on the first page of Exhibit 21 in evidence?

A. It indicates the total number of dozens of frozen pies sold.

Q. In what year?

A. 1958 and 1959, the gross sales, the various categories of expenses, and the net profit or loss.

Q. Now, were these taken right from the books and records of the Pet Milk Company?

A. Yes, sir.

Q. Now, would you be good enough to state whether or not those records disclose a profit or loss for the Salt Lake City Division on frozen fruit pies by the Pet Milk Company for the years 1958 and 1959?

A. It indicates a loss in 1958 of $67,027 and a loss in the year 1959 of $51,184.

Q. Now, how about the San Francisco Division?

A. The San Francisco Division lost $147,771 in 1958 and $190,250 in 1959.

Q. And how about all sales divisions on frozen fruit pies of the Pet Milk Company in those two years?

A. In 1958 all sales divisions lost $921,270, and in 1959, $573,356.

Q. Now then, would you be good enough to state generally [fol. 189] what you have done on the second page of Exhibit 21?

A. The second page is the same financial information broken down by amounts per dozen. It indicates gross sales, net sales, cost of sales, gross profit, selling, and general and administrative expenses, all in terms of per dozen. And then the profit or loss per dozen.

Q. Now, this is on a per dozen basis?

A. Yes, sir.

Q. And what does that disclose as to whether or not there was a loss per dozen in the Salt Lake City area.

A. It indicates that in 1958 there was a loss of 72 cents per dozen. In 1959, a loss of 43 cents per dozen.

Q. And for the San Francisco Division?

A. In San Francisco, in 1958, 59 cents per dozen; in 1959, 48 cents per dozen; and in all sales divisions, in 1958, 74 cents per dozen, and in 1959, 35 cents per dozen.

Q. The contrast for the total two years, 56 cents per dozen were lost for Salt Lake City, and 52 cents per dozen in all sales divisions?

A. That is correct.

Q. So that the loss in Salt Lake City was greater than in the other sales divisions; is that correct?

A. That is correct, for the two years total.

Q. Now then, on the third page, Mr. Caldwell, would you be good enough to state generally what that is? It's the third page of Exhibit 21.

A. This indicates for 1960 and 1961, the operations of the Pet Milk Company for their various divisions. There was a change in accounting in 1960, whereby they ceased accounting on a divisional basis and went to product account-

ing. This, of course, includes the national figures. The products which we have set out separately are the Pet brand, the Pet-Ritz brand, and the Swiss Miss brand.

• • • • • • • •

[fol. 190] By Mr. Alioto:

Q. Okay. Now then, does that indicate that a loss was suffered for the years 1960 and '61, as well as the prior years?

A. Yes, there was a loss in each of the years.

Q. Now, you in another exhibit have actually summarized that loss for us, have you not, for all of the years in question?

A. Yes, sir.

Q. So we'll just go on. And what does the last page of this Exhibit 21 show?

A. It's the same information, broken down on a per dozen basis for each of the brands in each of the years.

Q. And naturally, that would show a loss on a per dozen basis, as well as on an over-all basis?

A. Yes, sir.

Q. Now, Mr. Caldwell, did you prepare substantially the same study for the Carnation Company?

A. Yes, sir.

Q. And is that contained in a document which you have titled, "The Carnation Company, the Summary of Territorial Profit and Loss on Frozen Fruit Pies for the Pacific Northwest, Mountain States, Southern California, Northern California, and the total western divisions"?

A. Yes, sir.

Q. From which source or from what source did you prepare this document?

A. This was from the company's books and records, the statements which they had prepared.

Q. I take it that you prepared one copy originally, and then there was some consultation between you and the Carnation accountants?

A. Yes, sir.

Q. Resulting in some modifications?

A. We computed the amounts based upon an accumulation of their monthly figures and found that they made certain year end adjustments, but didn't change the monthly statements.

Q. This has been prepared generally in the same fashion as the *preceeding* exhibit, has it not?

A. Yes, sir.

Q. And to the best of your knowledge, Mr. Caldwell, does it accurately reflect the basic facts set forth in the books of the Carnation Company?

A. Yes, sir.

Mr. Alioto: We'll offer it into evidence as the Plaintiff's Exhibit next in order.

[fol. 191] Mr. Billings: May I voir dire this witness?

The Court: Yes.

Voir dire examination.

By Mr. Billings:

Q. Mr. Caldwell, in connection with the preparation of Plaintiff's proposed exhibit 22, did you use these Carnation Company's frozen food division territorial profit and loss statements?

A. Yes, sir.

Q. I show you here such documents marked, "Year to Date for the years 1959, 1960, and 1961."

A. I might say this, Mr. Billings, that we originally used the monthly statements and accumulated them for the twelve month period. The statement which you have in your hand was furnished me on Sunday by Mr. Bye.

Q. You hadn't seen these before?

A. That's correct, before Sunday.

Q. Now, have you checked figures which appear on Exhibit 21, is it? 22? Have you checked them against these territorial profit and loss year to date figures which I have in my hand?

A. It was checked by a member of my staff, yes, sir.

Q. So in effect, as I understand it, then, the exhibit which you hold in your hand and the sheets which I have in my hand are mere copies of each other; is that correct?

A. That is correct. Uh-huh. Yes, sir.

Q. Now, turning to the second page of the exhibit, where you've done it by costs, there you copied the per cost figure or per case figures and doubled them which are on these books and records of the Carnation Company?

A. Yes, sir.

Voir dire examination.

By Mr. Billings:

Q. Or did you take the figures which were on page 1 and divide the total number of dozens, or total number of cases, in the gross sales—which way did you do it?

A. We re-divided.

Q. You re-divided?

A. We re-divided.

Q. You didn't copy from—

A. No.

Q. Did you check to see if these figures, which are on your proposed exhibit, are the same as on the material which was furnished you?

A. I am sure they were checked, yes, sir.

Q. Now, I notice that on your proposed Exhibit 21, or 22, whichever it is, you have listed just three divisions of the Carnation Company. Is there any particular reason why there are just those three and not the rest of them which are on here?

[fol. 192] A. Yes, sir. Because originally we were only furnished with those three division figures. The rest had been blacked out. The other divisions, of course, do appear on the statements which you have in your hand, which, as I say, the first time I seen them was on Sunday.

Q. You were furnished down in California, in Los Angeles, the offices of the Carnation Company, all of the

profit and loss statements for all the divisions, were you not? Were they not made available to you?

A. This is the first time I have seen these statements, Mr. Billings, on Sunday.

Q. How about the monthly profit and loss statements?

A. The monthly profit and loss statements we had before we went to Los Angeles.

Q. For all divisions?

A. No. For the three divisions which we have here, and the total Western Division.

Q. When you went to Los Angeles there were made available to you all of the profit and loss statements for all of the divisions of the company, isn't that correct?

A. I don't think so, Mr. Billings. My recollection is not, that we were confined to the Pacific Northwest, Mountain States, Southern California, Northern California, and the total Western Division, which was the information contained on the monthly statements which had been previously furnished us.

Q. Do you have, Mr. Caldwell, in your possession now the territorial profit and loss year to dates for the years 1959, 1960, and 1961?

A. Yes, I do. Yes, I have copies of them, yes, sir.

Q. You have the copies which were furnished to you?

A. Yes, sir, on Sunday.

Mr. Alioto: On Sunday.

By Mr. Billings:

Q. From which this document was prepared?

A. Yes, sir.

Mr. Billings: I would like to have those marked and put in evidence at this time, if I may, as the basic documents.

Mr. Alioto: I don't think you have a right to, but I will be glad to do it.

• • • • • • •

[fol. 193] Direct examination (continued).

By Mr. Alioto:

Q. Mr. Caldwell, you asked for these other divisions when you were in Los Angeles sometime ago, didn't you?
A. I think that is correct.
Q. It was not until last Sunday you received them.
A. That is correct.

Mr. Alioto: We have no objection to attaching—Mr. Billings, do you want to stand with me here so you can watch this attachment.

If your Honor please, at a later juncture we will try to do a more artistic job with this attachment, but as it is, we will offer it in evidence as plaintiff's exhibit next in order.

The Court: Any objection?
Mr. Billings: I have no objection, your Honor.
The Court: Received.

(Document marked Plaintiff's Exhibit 22 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Caldwell, with respect to the Carnation document, would you be good enough to tell us generally, again, so we can orient this—not "again," but tell us what this document purports to show.
A. It purports to show the number of cases sold, the sales price, the various expenses, and the operating profit or loss in each of the territories—that is, the Pacific Northwest Mountain States is one territory, the Southern California territory, the Northern California territory, and the total Western Division.

[fol. 194] Mr. Alioto: I think we can get at this faster, since it is in evidence, your Honor, if I simply read these totals off to the jury.

For the Pacific Northwest and Mountain States—

By Mr. Alioto:

Q. Now, that includes the State of Utah, does it not?
A. Yes, sir.
Q. And the State of Idaho?
A. Yes, sir.
Q. And Nevada?
A. Yes, sir.

• • • • • • •

[fol. 195] Q. Incidentally, Mr. Caldwell, I don't see anything on this exhibit for the year 1958. Is there some reason for it?

A. The information was not furnished, or not available.
Q. Did you ask for it?
A. Yes, sir.
Q. What were you told?
A. It was not available.

Q. Now, Mr. Caldwell, Plaintiff's Exhibit 23 for identification purports to be an analysis of operations, 1958, 1959, 1960, and 1961, for the Continental Baking Company, the Morton Frozen Foods Division.

Would you be good enough to state from what source materials you prepared this exhibit?

A. This was prepared from a quarterly breakdown that was furnished by Continental Baking Company for the two regions indicated and included in these exhibits.

Q. Now, what are those regions?

A. The first is Region 8 and—through 1961 that same region apparently was reclassified in 1961 and Region "W".

Q. Do you have a study for each region for the years 1958 to 1961?

A. Yes, sir.

Q. Were you given any information, or was there any information on the books and records of the Continental Baking Company, which indicated what states were encompassed within those regions?

A. They indicated that in the Region 8, which later became the Region "W", that Utah, Idaho, California, Oregon, and Washington was included in there, but we have no

knowledge of what other states may have also been included.

Q. Did you inquire about that?

A. Yes, sir, I am sure that we did make an inquiry. We have never received a clear answer as to just what states were included in there.

Q. Did you inquire about whether or not the Continental Baking Company set out its books so that you could get the profits and losses from the Utah territory alone?

A. I am sure that was requested, and we were informed that these schedules had to be prepared specially for this case, that in the normal course of business they did not keep, in their books and records, a divisional breakdown of operations.

Mr. Schafer: Your Honor, as to the last two questions, Mr. Alioto asked whether the witness knew, and the witness didn't say he knew. He said, "I am sure." In other words, the witness is simply guessing whether this information was ever requested and what the answer was if it was requested. I think the last two questions—I move that they be stricken.

[fol. 196] The Witness: I am certain, Mr. Schafer, that the information was requested.

Mr. Schafer: Do you know whether it was requested?

The Witness: Yes, sir, I do.

Mr. Schafer: You do?

The Witness: Yes, sir, I do.

By Mr. Alioto:

Q. In any event, what you have here in Exhibit 23 for identification, according to your best knowledge, Mr. Caldwell, accurately sets forth the facts that you gleaned from the books and records of the Continental Baking Company in the form in which they were made available to you?

A. Yes, sir.

Mr. Alioto: We will offer this in evidence, if your Honor please, as plaintiff's exhibit next in order.

Mr. Schafer: Your Honor, I wonder if I might have a statement of purpose at this time?

The Court: No.

Mr. Schafer: Is it offered to prove that the Continental Baking Company has been conspiring—

The Court: I told you we weren't going into that now.

Mr. Schafer: If it is offered to prove a conspiracy, your Honor, I submit it is inadmissible.

Moreover, the document shows Continental Baking Company's total profit or loss in these two districts for all of its products, 53 separate products. What this case involves is the charge that Continental Baking Company has sold at a loss in Salt Lake City marketing area six products, apple pies, cherry pies, boysenberry pies, peach pies, mince pies, and pumpkin pies. That is what the issue is.

Unfortunately, Continental Baking Company doesn't have a profit and loss statement in terms of those products. This covers 53 separate products. It doesn't prove a thing about this case.

[fol. 197] Moreover, the geographical area involved is way beyond the Salt Lake City marketing area. It simply doesn't tell us whether or not the Continental Baking Company was selling the six flavors at a profit or a loss in Salt Lake City in 1958, 1959, 1960, and 1961, so it is of no help to the issues in this case.

I therefore move that it not be admitted into evidence.

Mr. Alioto: Is there any question but what pies are included in those totals?

Mr. Schafer: There's no question but what pies are included.

Mr. Alioto. This is the best we have, your Honor, from a company that claims it didn't have anything else. We will offer it at this time, and we will expect, of course, to supplement it with a study based upon the testimony of Mr. Chapman, which has just been concluded this morning. We are told that the Continental Baking Company doesn't have these kinds of records.

Mr. Schafer: The fact of the matter is it doesn't have. This includes meat pies, pot pies, chicken pies, everything

else in the Morton line. It is of no help. Why don't we get a study of the six flavors?

The Court: Why don't you give it to him?

Mr. Schafer: We don't have one, your Honor. We told him that.

The Court: The objection is overruled. The exhibit is received in evidence.

(Document marked Plaintiff's Exhibit 23 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Caldwell, were you in the offices of the Continental Baking Company?

A. No. I was not.

Q. Were you given the opportunity to look at the original books and records of the Continental Company?

A. I was given the opportunity. However, we relied upon the statements made that the information was not available, that they didn't keep their books and records in a manner in which it could be obtained.

[fol. 198] Q. Who made that statement to you?

A. It was contained in a deposition, actually, and I am sure that Mr. Schafer and I have had some questions back and forth in regard to certain of the accounting matters also.

Q. He told you the Continental Baking Company didn't have those records segregated down to pies, is that correct?

A. I don't remember whether Mr. Schafer specifically said that, but I know it was contained in the deposition of the accounting officer of Continental Baking Company.

Q. Now, then, Mr. Caldwell, what we have then is the Morton Frozen Foods Division, an analysis of operations by region?

A. Yes, sir.

Q. Would you be good enough to state with respect to that matter what it is that you do have, just the general nature of this exhibit.

A. It indicates the gross sales, the cost of sales, the various operating expenses, and the profit or loss before taxes in the two regions.

Mr. Alioto: Now, I can quickly tell the jury what that generally shows.

It shows a loss of $5200 in 1958, a loss of $3300 in 1959, they are at about break-even in 1960, a profit of $9,900 in 1961. That second division has a loss of $19,—or the second region, which includes Salt Lake, a loss of $19,000 in 1958, a profit of $1800 in 1959, a loss of $500 in 1960, and a profit of $4300 in 1961.

* * * * * * *

Q. Now, then, with respect to this last year, 1961, where there appears to be an overall profit of approximately $13,000 combined, that doesn't mean, does it, that there was any profit on frozen fruit pies sold in Mr. Chapman's territory?

Mr. Schafer: Does he know, your Honor?

Mr. Alioto: Of course he knows.

The Court: Ask him.

Mr. Schafer: Ask him.

The Court: You ask him. Do you want to voir dire this fellow?

Mr. Schafer: I think he ought to lay a foundation. Does he know or doesn't he?

[fol. 199] The Court: Will you please tell the Court whether you know, Mr. Caldwell.

The Witness: I will say this, that it is certainly not an indication that any profit was made in Salt Lake City, based upon the prices at which they were selling pies, which was lowest in 1960. It doesn't appear feasible that there should be a profit in comparison with the other periods.

* * * * * * *

By Mr. Alioto:

Q. Now, then, Mr. Caldwell, there has been marked for identification as Plaintiff's Exhibit 24 a document entitled

"Comparison of Net Sales Price Per Dozen in the Salt Lake Division with Net Sales Price Per Dozen in all other Sales Divisions of the Pet Milk Company."

A. Yes, sir.

Q. Would you be good enough generally to state to the Court and jury the source from which the information set out on Plaintiff's Exhibit 24 for identification—the source used by you in connection with procuring the information set out in Plaintiff's Exhibit 24 for identification.

A. This was prepared from Pet Milk Company documents furnished us.

Q. And do the figures set forth in Plaintiff's Exhibit 24 for identification accurately portray the facts as you secured them from these documents of the Pet Milk Company?

A. Yes, sir.

Q. And these are internal documents of the Pet Milk Company?

A. Yes, sir.

Mr. Alioto: We will offer it in evidence, if your Honor please, as our exhibit next in order. Counsel has indicated to me he would like additional time to study this particular exhibit, since it was handed to him last night. And I have no objection to deferring the ruling on the offer until such time.

By Mr. Alioto:

Q. Now, Mr. Caldwell, I call your attention to Plaintiff's Exhibit 25 for identification, which purports to be a comparison of the gross sales price and net sales price per dozen for Pet-Ritz brand pies between Salt Lake City invoices furnished and the total sales by the Pet Milk Company. Would you be good enough to indicate the source from which this material was prepared.

A. The information for the Salt Lake invoices was obtained from an IBM run which was recently furnished us by the Pet Milk Company. The information for the total sales was contained in documents furnished us by Pet previously.

[fol. 200] Mr. Alioto: We will offer those in evidence—

By Mr. Alioto:

Q. And do the figures set out in this document, to the best of your knowledge, accurately reflect the facts as stated therein?

A. Yes, sir.

Mr. Alioto: We will offer this in evidence, if your Honor please, as plaintiff's exhibit next in order and request that the ruling on this be deferred until a later time, at the request of Mr. Lamb, which we discussed at recess.

By Mr. Alioto:

Q. Mr. Caldwell, I call your attention to Plaintiff's Exhibit 26 for identification, which purports to be a comparison of the Pacific Northwest-Mountain States Division's operation with all other frozen foods division operations.

A. Yes.

Q. Did you prepare that study?

A. Yes, sir.

Q. Was this prepared from the books and records of the Carnation Company?

A. Yes, sir.

Q. Do the facts therein contained accurately set forth the facts set out in the books and records of that company?

A. Yes, sir.

Mr. Alioto: We offer it in evidence, if your Honor please, as our exhibit next in order.

* * * * * * * *

By Mr. Alioto:

Q. Mr. Caldwell, Exhibit 27 for identification purports to be a study indicating the computed net profit or loss per dozen on apple, cherry, boysenberry, and peach frozen pies for the Pet Milk Company.

A. Yes, sir.

Q. Would you be good enough to indicate the source from which this material was prepared.

A. This has been prepared from documents and accounting records furnished us by the Pet Milk Company.

Q. To the best of your knowledge, are the facts set out in this exhibit accurate from the standpoint of the source from which they were derived?

A. Yes, sir.

[fol. 201] Voir dire examination.

By Mr. Lamb:

Q. Mr. Caldwell, is this document prepared in accordance with accounting procedures, regular accounting procedures known by you?

A. Yes, sir.

Q. Whose theory was this? Was this the suggestion of Mr. Alioto?

A. It was prepared under Mr. Alioto's direction, yes, sir.

Q. In other words, you were instructed to choose the lowest price and the highest cost, and to average this out in order to show a fictitious loss in a column which you describe as profit or loss before all other expenses?

A. No, sir, Mr. Lamb. Those were certainly not the instructions. Prices used—the net price per dozen purports to be the absolute net price, which is indicated very clearly on the schedule heading.

Q. At full truck?

A. At full truck, yes, sir, the lowest absolute net price. This was based upon a study which we made for each of the defendants in arriving at what we term the absolute net price. And I am sure that a copy of that schedule has been previously furnished each of the defendants.

Now, that absolute net price purports to be this: that it is the truck load price less all of the so-called deals and less the cooperative advertising. The cooperative advertising essentially, all three defendants, began in 1957 with a 5 cents per case or 10 cents per dozen. In approximately April of 1960 Continental went to two and a half cents per

case or 5 cents per dozen, and in July of 1960 the other two defendants dropped it to two and a half cents per case or 5 cents per dozen, and then it was entirely eliminated in 1961. So the price is the truck load price less the deals less the cooperative advertising allowance which we have also eliminated in the expense application. The manufacturing costs further—we have weighted those sales prices in a product mix, which we felt to be representative of all of the defendants. That product mix was furnished us by Carnation Company. The manufacturing costs per dozen are the manufacturing costs which was furnished us by each of the defendants.

Q. What do you mean by a "product mix"?

A. That is that at any one period of time there would be approximately, let's say, 40—or 50 per cent apple flavor sold, 30 per cent cherry, perhaps 15 per cent peach, and maybe 5 per cent boysenberry. There is a schedule attached indicating for each of the years that product mix.

* * * * * * *

[fol. 202] Q. But this document was designed by you under the instructions of Mr. Alioto?

Mr. Alioto: I submit this is argumentative and is not voir dire.

The Court: Yes. The objection is sustained.

By Mr. Alioto:

Q. Mr. Caldwell, on the basis of your experience as an accountant, state whether or not you have an opinion as to whether or not the study which is Exhibit 27 was prepared in accordance with good accounting practices.

A. Yes.

Mr. Alioto: We'll offer it in evidence, if your Honor please, as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Lamb: I object, your Honor. This document is irrelevant and does not tend to prove or disprove any of the issues of this case.

The Court: Objection—is that all? The objection is overruled. The document is received.

[fol. 203] (The exhibit marked Plaintiff's Exhibit No. 27 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Caldwell, in connection with this matter, state what my instructions to you were as long as there's been some suggestion that I asked you to make up some fairy stories.

A. The instructions were to prepare a schedule predicated upon the price lists for apple, using the absolute net price, using the manufacturing costs as furnished by the defendants, and the other costs as reflected in their profit and loss statements.

Q. Now, let me make this plain. Is this study predicated upon net price per dozen taken from any invoices representing the actual sale prices, or were they taken from the offerings or the price lists of these companies?

A. They were taken from the offering or price lists of the companies.

. . . . . .

[fol. 204] Mr. Alioto: We'll offer this in evidence, if your Honor please.

. . . . . .

Voir dire examination.

By Mr. Billings:

Q. Let's just go across the top of this proposed Exhibit 28, Mr. Caldwell. The first one is captioned, "Effective Price Date" and then I assume you've taken a number of various points of time.

A. Let me say this, Mr. Billings. We have taken all of the price changes in the price of apple pie.

Q. These reflect then—

A. During that entire period. There are no exclusions whatsoever. That's all of the price changes during that period.

Q. All right. Then you have four columns for four different flavors, net price per dozen. What is the source of the material shown in these four columns?

A. The price list, less the deals, less the co-op, advertising.

Q. The price lists which we furnished you, the deal list which we furnished you, and then the co-op; is that right?

A. Yes. The source of that specifically would be on the net pricing study, of which I'm sure you've been furnished a copy.

Q. Yes. And then the weighted average net sales price is merely a computation based on these four different flavors, with the weighting in accordance with the figures that Mr. Bye of the Carnation Company gave you; is that right?

A. Yes, sir.

Q. And what's the source of your manufacturing cost per dozen, the next four columns?

A. The cost studies which you furnished us.

[fol. 205] Q. The Carnation Company cost studies?

A. Yes, sir.

Q. And they were for various period, were they not?

A. Yes, sir.

Q. And then with respect to the effective price date, you've taken the cost date; is that correct?

A. That's correct. Now, I might say this, that, of course, apparently the company did not make a cost determination of each of the price date changes. However, we used the cost information for the period within the—for which the cost determination had been made. So that may be used on several dates of price change there.

Q. In other words, if we got a cost study—

The Court: Now, now, you're going beyond what you said you wanted to do at this point. I don't want to divide this up.

Mr. Billings: I just want to find out—I'll reserve that for later, your Honor.

By Mr. Billings:

Q. And then the next column, weighted average—

Mr. Alioto: Do you have any objection to standing behind the witness, so you won't be between the witness and the jury?

Mr. Billings: I didn't intend to. I wanted he and I to look at the list at the same time.

Mr. Alioto: They ought to hear him, too, though.

By Mr. Billings:

Q. The weighted average manufacturing cost, then, is a computation based on the four *preceeding* columns on the same ratio, as the prices?

A. Yes.

The Court: I thought you were going to ask about the source.

Mr. Billings: That's correct.

The Court: Well, you're not asking. You're going beyond it.

By Mr. Billings:

Q. Now, the next column, net sales less manufacturing cost, what's the source of that information?

A. That's just the weighted sales less the weight of manufacturing.

Q. All right. And what's the source of the material on spoils?

A. Carnation Company and Pet Milk Company during most of this period was using one cent per case, or two cents per dozen, on spoils.

[fol. 206] Q. That isn't what I asked you. What was the source of this material?

A. From the information contained in the financial statements of Carnation Company and Pet Milk Company.

Q. Well, you didn't get anything from the Pet Milk Company about the Carnation Company. I want to know where you got the two cents that shows on spoils. What particular document of the Carnation Company?

A. It would be from the profit and loss statements.

Q. Those territorial profit and loss statements that I showed you?

A. That's right.

Q. Now, what about freight?

A. The freight was the I.C.C. rate quoted by Mr. Bye.

Q. And the next column, "Brokerage and Other Direct Selling," what's the source of that?

A. Taken from your profit and loss statements.

Q. The one Mr. Bye furnished you?

A. Yes, sir.

Q. And then the next column is the total of the preceding three columns?

A. Right.

Q. And then the next column is a computation on the preceding columns; is that right?

A. Just a mathematical computation.

Q. The next column, "Other Selling and G & A Expenses." What's the source of that material?

A. From the profit and loss statements.

Q. Now, you've captioned this, "Salt Lake Area." Was there any profit and loss statement for the Salt Lake area that you were furnished?

A. No, sir. These are the unit or per dozen figures from your profit and loss statement.

Q. For the—

A. For the Pacific Northwest-Mountain States Division, which included the Salt Lake area.

Q. There were other states included besides that?

A. Yes.

Mr. Billings: I see. Thank you, your Honor.

By Mr. Alioto:

Q. Mr. Caldwell, have you made the same study for the Continental Baking Company predicated upon the same standards and the same sources which you have indicated for the Carnation and the Pet exhibit?

A. Yes, sir, except with the Continental Baking Company we were not furnished the per dozens that would coincide with an operating statement, so that we could get a per dozen figure, as with the other two defendants. However, we have computed these by taking a percentage of the various categories of direct selling, general and administrative, as a percentage of sales, on the statements furnished us, and applied that same percentage to the sales price here, which is the best available information we had for this purpose.

[fol. 207] Q. And you believe that this was prepared in accordance with good accounting practice? A. Yes, sir.

Mr. Alioto: We'll offer it in evidence, if your Honor please.

• • • • • • •

(The exhibit marked Plaintiff's Exhibit No. 30 for identification was received in evidence.)

[fol. 208] By Mr. Alioto:

Q. This speaks of, "Standards, Fresno Plant." And standards on various pies. In that sense, what does "standards" mean?

A. It means "most representative" or "the best determination that they can make at that particular time."

• • • • • • •

By Mr. Alioto:

Q. Now, Mr. Caldwell, I show you Plaintiff's Exhibit 31 for identification. Would you be good enough to look at that, please, Mr. Caldwell, and then state what it is.

A. This is a summary of the annual sales and net income before taxes from the annual reports of the defendant and the available frozen pie volume profit or loss before taxes in the certain competitive areas with Utah Pie.

Q. And what other sources was that exhibit prepared from, Mr. Caldwell?

A. From the annual statements of the three defendants and from the profit and loss statements furnished us in regard to their frozen pie operations.

Q. Does the exhibit correctly set forth those facts as you secured them from those sources?

A. Yes, sir.

[fol. 209] Mr. Alioto: We'll offer it, if your Honor please, as the plaintiff's exhibit next in order.

Mr. Lamb: No objection to that part pertaining to the Pet Milk Company.

The Court: Received in evidence.

Mr. Schafer: Your Honor, could I just note for the record that I have no objection as to Continental, but I assume that—I do have an objection as to the Carnation and Pet data.

I don't know whether you want me to note that or not, but I probably should.

The Court: All right. Received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 31 for identification was received in evidence.)

. . . . . .

[fol. 210] Mr. Alioto: If your Honor please, I would like to make a statement for the jury on a matter that was discussed this morning. The Court will recall that at Mr. Billings' request we attached to our Carnation Exhibit 22 a divisional profit and loss statement that Mr. Billings requested we attach. The witness Mr. Caldwell was asked about when the first time was that he saw the statement, and he replied the first time was last Sunday. That is correct. But Mr. Billings and Mr. Baird bring to my at-

tention the fact that this statement was handed—or a substantially similar statement was handed to a colleague of mine in November and December, and I am happy to acknowledge that that is the fact, although Mr. Caldwell's statement that he didn't see this document until last Sunday is also the fact. I just wanted to state that so there would be no question about that.

* * * * * * *

[fol. 211] Mr. Alioto: 26 is to the Carnation Company. This is a study of the comparison of the Pacific Northwest with the other food division operations, and I think the basic data has been in the hands of counsel for some time.

Mr. Billings: I just got this one this morning. I would like the same reservation.

The Court: All right. We will reserve the ruling.

Mr. Alioto: 28 is the same study for the Carnation Company, predicated on the price. The Pet exhibit on the same subject has already been introduced.

[fol. 212] Mr. Billings: 28, your Honor, is the one I would like to complete my voir dire of Mr. Caldwell on.

The Court: All right.

Voir dire examination.

By Mr. Billings:

Q. Mr. Caldwell, I have made some marks on this during the noon hour so I could try and understand it. As I understand, the first five columns of your proposed Exhibit 28 are based on your study of the actual sales in the Salt Lake market area. These are Salt Lake market prices, is that correct?

A. That is right, net absolute price in the Salt Lake market.

Q. Then the column referring to manufacturing cost per dozen, is that taken from the platform cost, frozen food division sheet of the Carnation Company which we furnished you?

A. Yes, sir.

Q. Do you have that available so I can ask you some questions about it?

A. No, I am sorry, I don't have a copy of that in my briefcase.

Q. I happen to have one here. Is this a copy of the document which was furnished you and from which you prepared that exhibit?

A. Yes, sir.

Q. I call your attention first—is there anything which shows 1958 costs on there?

A. No, sir. We had to use 1959 costs, inasmuch as there were no '58 costs available.

Q. And the earliest date in '59 is June 1, is it?

A. Yes, that is correct.

Q. So that for the sales date of January 20, 1958 shown on this exhibit you used costs for June 1, 1959, is that correct?

A. Yes, sir, that is correct.

Q. Now, were you not told, Mr. Caldwell, when this was furnished to you, that these were estimates made by the accounting department of prospective costs of the dates immediately following the dates shown on the platform cost document?

A. We were told that it was the best cost information available.

Q. And this was an estimate of future costs?

A. Yes, sir.

[fol. 213] Q. So that if it shows June 1, 1959, that would be an estimate of what the costs would be for the immediate future after that?

A. Yes. However, it was based upon actual costs for the preceding period.

Q. Things such as indirect labor and overhead would have to be a guess, would they not?

A. Ordinarily—it is not quite in the category of a guess, Mr. Billings. Ordinarily it is predicated upon actual experience in determining an overhead rate.

Q. What I am getting at is this: If you hadn't made any pies yet in June, you couldn't know what your indirect costs were going to be; you would have to guess based on past months' experience, isn't that right?

A. Ordinarily it would be predicated both on past months' actual experience and a projection of sales or volume.

Q. And so this is based on past month sales, plus guesses as to what future sales—

The Court: That isn't what the witness said.

The Witness: I can't say what this is based on, but in ordinary situations it would be based on actual experience in the past, and also a projection of volume in arriving at the overhead rates for future cost.

By Mr. Billings:

Q. And "projection" is a guess, is it not?

Mr. Alioto: This is not voir dire examination. This is cross examination.

The Court: This is cross examination. All right. Now, Mr. Billings, if you have any voir dire, go ahead and do it.

Mr. Billings: I'm trying to see how he made up this document.

The Court: You climb into the chair with the witness there and cross examine him. That isn't proper voir dire examination.

Mr. Billings: That's the only way he and I can look at the same document at the same time that I can see.

The Court: I thought you had another copy.

Mr. Billings: He didn't have one. I had one, your Honor.

[fol. 214] The Court: You only have one?

Mr. Billings: Yes, sir.

The Court: All right. Well, now, if you have any questions you want to ask him in a preliminary way, do it. You're cross examining this witness.

Mr. Billings: I'm trying to find out, your Honor, how he made this—

The Court: You're trying to thrust down his throat a guess proposition.

By Mr. Billings:

Q. Now, Mr. Caldwell, the columns which are marked, "Spoils," and, "Brokerage and Other Direct Selling," and, "Other Selling and G & A Expense," as I understand your testimony this morning, you took from the territorial P. and L.'s, profit and loss statements, which were furnished to you; is that right?

A. That is correct.

Q. And they have been attached to Exhibit 22? These documents (showing)?

A. Yes, sir.

Q. And from which column of these sheets which have been attached to Exhibit 22 did you take the information which you used in these columns from proposed Exhibit 28?

A. There were some underlying monthly studies and breakdown in the company's records tying in to the general categories of expense here. We converted that to a per dozen basis and used that unit on a per dozen basis in this study.

Q. I see. In other words, you took some supporting sheets which made up this sheet?

A. Yes, sir.

Q. And used those for the Pacific Northwest-Mountain States column; is that right?

A. Yes.

Q. That was the breakdown?

A. Yes, sir.

Q. And what areas are there encompassed within the Pacific Northwest-Mountain States, if you know?

A. That I can't say for certain. I know that Utah, Idaho, Oregon, Washington, is encompassed in the area. What other specific areas would be covered I have no knowledge.

Q. I see.

Mr. Billings: Your Honor, I object to the introduction of Exhibit 28 on the ground that it is a compilation of actual sales prices in Salt Lake, projected costs from the [fol. 215] Los Angeles plant, and averages for the entire Northwest area, Pacific Northwest area, which composes the States of, as the witness stated, Washington, Oregon, Utah, Idaho, and so on. In other words, he's trying to show with respect to sales in Salt Lake City, he's deducting expenses based on averages of a large territory, including such sales centers as Seattle and Portland, Spokane, Boise, and so on. And so, in other words, we're comparing apples with oranges. This whole thing is a guess and what somebody would like to be, if you knew what the figures were, and I object to it on that ground, if your Honor please.

• • • • • • •

The Court: Objection overruled. It's received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 28 for identification was received in evidence.)

Mr. Alioto: We'll offer at this time Exhibit 29, the same document with respect to the Continental Company. It's already received for Pet and Carnation. We'll offer it for the Continental Company.

Voir dire examination.

By Mr. Schafer:

• • • • • • •

[fol. 216] By Mr. Schafer:

Q. Mr. Caldwell, can you tell me what the source is of your figures listed under the heading, "Net Price Per Dozen"?

A. That is from your price lists, and also based upon a study which Continental furnished, indicating their net price per dozen in the Salt Lake area.

Q. So that you used a study that Continental provided to you, in order to determine the prices shown in the four columns under the four flavors?

A. Yes, sir. Essentially that is true. We also had available to us the Continental's price lists, their deal sheet, and so forth. I think there were one or two price lists and deal sheets which were not included in the Continental list which was furnished. I think there were only one or two instances. They were very minor.

Q. But basically you took the schedule submitted to you by Continental as the accurate statement of the prices under these flavors?

A. Yes, sir.

Q. Did that schedule show Continental's prices for other marketing areas, Mr. Caldwell, that you can recall?

A. Yes, I'm certain that it did. I know that it included the Los Angeles prices, the Denver prices, perhaps other areas.

Q. Have you checked those prices for accuracy, too, Mr. Caldwell?

A. In certain instances, yes. I'm sure that we may have made some spot checks on the schedule as a whole. At least, the price list studies which we independently made.

Q. I think you submitted to Continental some suggested corrections, have you not, to—strike that, please. Am I correct, Mr. Caldwell, that you supplied Continental with a statement of amendments to your price schedule that you worked up on the basis of Continental's price schedules?

A. I think there were approximately three corrections.

Q. Yes.

A. Yes, sir.

Q. And insofar as the price schedule that you have worked up is amended by that supplemental statement, you are satisfied that the Continental price schedule is accurate?

A. Yes, sir.

Q. Now, in terms, Mr. Caldwell, of this heading, "Weighted Average Net Sales Price," could you describe to us what the source is of that data?

A. The source of that data is the product mix which was furnished us by Carnation. By this "product mix," we mean the probable volume of apple, cherry, boysenberry, and peach. In other words, to refute the theory that a customer would buy one of each flavor on a given date. The probability is that they would buy twice as many apple, probably a third as many cherry, and lesser amounts for the peach and boysenberry.

[fol. 217] Q. But the source of this product mix on which you based your weighted average is not Continental, but Carnation?

A. Yes, sir. That's the best information we had available.

Q. Did you ask Continental for similar information?

A. Not directly as such, no, sir.

Q. Did you ask Continental for similar information, Mr. Caldwell?

A. Not in regard to this study, no, sir.

Q. Not in regard to anything, did you, sir?

Mr. Alioto: Well, if your Honor please, it was through the attorneys that anything was asked of Continental; and if you ask us whether we asked you for a product mix, the answer is no.

Mr. Schafer: All right. Thank you.

By Mr. Schafer:

Q. Now, Mr. Caldwell, turning your attention to the heading under, "Manfacturing Cost Per Dozen," subdivided into four fruit flavors—

A. Yes, sir.

Q. —could you state for us the source of the information listed under those columns?

A. It was from the Cost to Doors Manufacturing Report, which is furnished to us by Continental. Also, certain information from Bright Foods and Parkway, who are co-packers for Continental.

• • • • • • •

[fol. 219] Q. Now, sir, let's turn to the year 1961; and without reading the data out loud, let's refer, if you will, to the apple costs shown. Can you tell us where those figures for the first quarter of 1961 come from?

A. You can't tell from this schedule, but it would either be from your Cost to Doors report or from the Parkway or Bright prices which you included in the Cost to Doors report. I've forgotten during the first part of '60, I've forgotten whether you were shipping out of—

Q. I think you mean '61.

A. Or, '61, whether you were shipping out of California or Webster City. As I say, I revised this costing in accordance with the information which Mr. Muth gave to me Sunday in that regard.

Q. Right. Now—

Mr. Alioto: Mr. Schafer, would you mind identifying Mr. Muth? He's an attorney associated with you, is he not?

• • • • • • •

[fol. 220] Q. In other words, the product mix supplied by the Carnation Company?

A. Yes, sir.

Q. Then you show net sales less manufacturing costs. I take it that's simply—

A. Mathematical computation.

Q. Mathematical. Right. How about your Spoils column, sir? What Continental documents did you rely upon for developing that data?

A. The spoils was actually taken from the records of the two other defendants. During the period 1958 and 1959, I

think that Pet Milk Company records indicate that spoils and declines amounted to as much as five cents per dozen. In 1959 it approximated 1.7 cents per dozen. Continental records did not set out the spoils as such. However, we had to interpolate our bringing that two cents per dozen from the financial information of the other defendants, which seemed to be more refined than the Continental information. We're certain that there were some spoils and declines, because we've seen invoices to that effect.

Q. Do you have any evidence, Mr. Caldwell, that Continental's spoils payments, if there have been any at all, have amounted to the figure shown on this schedule?

A. There is no way of determining that. As I say, I'm certain that there were. I just hurriedly skimmed through some invoices and credit memos. Right here. Here are two, for example, damaged merchandise, a credit memo. Here's another invoice—

Q. This credit memo, I take it, sir, does not show that it covers fruit pies?

A. It does not show that it covers fruit pies.

Q. How about the next one?

A. That doesn't indicate what product was involved. It is a customer which did buy fruit pies. It doesn't indicate the dozens or the amount involved. It just shows a net credit.

Q. It doesn't show the dozens?

A. No.

Q. It doesn't show the amount?

A. No, no, sir.

Q. It doesn't show the kind of product?

A. No, sir, it does not.

Q. It could be meat pies?

A. It possibly could be.

Q. Both invoices relate to a customer in California?

A. That is Hayward, California? Yes, sir, that's true.

Q. And that's all you had to rely upon?

A. This doesn't purport to be a complete check in that regard. It's just two that I very hurriedly picked up.

Q. One invoice on which you rely shows a shipment from Crozet, Virginia, doesn't that, sir?

A. That would be Crozet, Virginia, to Hayward, California.

Q. Do you know whether or not Continental shipped fruit pies from Crozet, Virginia, to this customer during this time?

[fol. 221] A. I have no idea.

Mr. Alioto: This is cross-examination, rather than voir dire.

Mr. Schafer: It's voir dire, if your Honor please, on the validity.

The Court: No, it isn't.

Mr. Schafer: All right.

The Court: Cross-examination.

By Mr. Schafer:

Q. Did you ever ask Continental, Mr. Caldwell, for any data that they might have which would reflect spoilage payments?

A. Mr. Muth indicated to me on Sunday that you had no spoilage on your fruit pies.

Q. In Salt Lake City?

A. In Salt Lake City.

Q. During 1960 and '61?

A. He didn't confine it to any period of time.

Q. What's the source, sir, of the data listed under the freight column?

A. The freight column is based upon information which Mr. Muth also furnished. During the time that the product was being shipped from Webster City, it was being shipped in Morton's own trucks. Where it was shipped from California, it was being shipped by common carrier. He furnished the common carrier rate, which is the same common carrier rate which Carnation was using out of California, and the Morton truck rates were predicated upon

internal accounting records and varied for each of the years involved.

Q. And you accepted those internal accounting records as being correct?

A. Yes, sir.

Q. In respect, again, of the spoilage payments, sir, did you ask Mr. Muth to check last Sunday as to whether there were in fact spoilage payments?

A. No, he merely indicated to me that there were no spoilage—

Q. So far as he knew?

A. He didn't say as far as he knew. He said there were no spoils.

* * * * * * *

[fol. 223] Mr. Schafer: Now, your Honor, I object to the admissibility of this document. In respect to the charge that the three companies have conspired to destroy or injure this plaintiff, it proves nothing. In respect to the charge that Continental has discriminated in price in violation of 2(a) of the Clayton Act, the document again proves nothing. The jurisdictional reference there, of course, is that you have two sales that you can compare. This document doesn't even purport to report sales. It simply reports offering prices and has nothing to do with actual sales. So that therefore it has nothing to do with a discrimination charge. It has nothing to do with the conspiracy charge.

Mr. Alioto: We think, if your Honor please, what the offering prices were is some evidence of what prices actually were charged, although not conclusive. We want to show, at least on the basis of their offering prices, they were selling at a loss so far as this area is concerned. We submit it.

Mr. Schafer: I just want to make it clear, your Honor, that offering prices have nothing to do with Patman violation.

The Court: The objection is overruled. The exhibit is received.

(Document marked Plaintiff's Exhibit 29 for identification was received in evidence.)

[fol. 224] Mr. Alioto: I would like to indicate to the jury, if your Honor please, what that exhibit shows with respect to Continental.

For the period January 6, 1958 a profit of 18 cents per dozen; the period of February 3, 1958, a profit of 15 cents per dozen; and beginning October 13, 1958, a loss of 39 cents a dozen; January 12, 1959, a loss of 11 cents a dozen; July 6, 1959, a loss of 16 cents a dozen; April 4, 1960, a loss of 60 cents a dozen; July 4, 1960, a loss of 11 cents a dozen; October 27, 1960, a loss of 36 cents a dozen; November 27, 1960, a loss of 12 cents a dozen; December 26, 1960, a loss of 36 cents a dozen; January 1, 1961, a loss of 44 cents a dozen; January 15, 1961, a loss of 20 cents a dozen; January 23, 1961, a loss of 55 cents a dozen; February 1, 1961, a loss of 64 cents a dozen; February 19, 1961, a loss of 20 cents a dozen; April 24, 1961, a loss of 64 cents a dozen; May 7, 1961, a loss of 20 cents a dozen; May 22, 1961, a loss of 69 cents a dozen; June 19, 1961, a loss of 82 cents a dozen, June 19 of 1961; July 2 of 1961, a loss of 4 cents a dozen; July 31 of 1961, a loss of 66 cents a dozen; August 13 of 1961, a loss of 4 cents a dozen; September 18, 1961, a loss of 65 cents a dozen; October 15 of 1961, a loss of 3 cents a dozen; October 27 of 1961, a loss of 60 cents a dozen.

We have no further questions of Mr. Caldwell, and, at this time, if your Honor please—at this time, if your Honor please, I would like to withdraw Exhibits 24, 25, and 26, so that there are no exhibits that are not in evidence in connection with the examination of this witness. We are withdrawing those which have not been accepted.

• • • • • • •

[fol. 225] Mr. Alioto: If your Honor please, in the light of the discussion in the Court's chambers, I would like to re-offer Exhibits 24, 25, and 26, all of which have been previously identified by the witness.

Mr. Lamb: No objection subject—
The Court: Do you need to have the same reservation?
Mr. Lamb: Yes.
The Court: Reserve the ruling.

Roy M. Anderson, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Anderson, would you be good enough to state your full name?
A. Roy M. Anderson.
Q. Where do you reside, Mr. Anderson?
A. Greenwich, Connecticut.
Q. Are you the vice president of the defendant Continental Baking Company?
A. Yes, I am.
Q. For how long a period of time have you been the vice president of that company?
A. Two years.
[fol. 226] Q. And prior to that what did you do in the company?
A. Assistant general counsel.
Q. As the vice president of the company, Mr. Anderson, would you be good enough to state whether or not your company maintains cost records from which it can be determined whether or not you made a profit or a loss on the distribution of frozen fruit pies?
A. I wouldn't know that, sir.
Q. Well, have you ever seen a cost record of your company which purported to set forth the profit or losses made in connection with fruit pies?
A. I have not.

Q. Have you ever had any discussion with anybody in your company as to whether or not your company had such records?

A. I have not.

Q. From the information that you have on your company and in light of the fact that you're a vice president of this company, can you give us any information as to whether or not such records exist?

A. I do not know if those records exist.

Q. Who is the best qualified man in the company to tell us whether or not this company has cost records and profit and loss records on its frozen fruit pies?

A. I wouldn't know who is the most qualified man, sir.

Q. Well, who is any qualified man in your company who could tell us that information?

A. My best opinion would be that it would be someone from our accounting department.

Q. And where are they located?

A. In Rye, New York.

Q. Are there any of them here in Salt Lake City at the present time?

A. No, sir.

Q. And have you yourself ever seen any kind of a study, even in connection with this case, that purported to set out whether or not the Continental Baking Company made a profit or loss in connection with the distribution of its frozen fruit pies?

• • • • • • •

By Mr. Alioto:

Q. Other than a study prepared by any attorney.

A. I have not, no.

[fol. 227] Q. Were you with the company in 1955?

A. Yes, sir.

Q. Did you have anything to do with the acquisition by the company of the Morton Frozen Food Company?

A. Yes, sir.

Q. What role did you play in that negotiation?

A. An attorney.

Q. You participated in the negotiations with the representatives of the Morton Food Company, did you?

A. I participated in negotiations for contract; not in the business negotiations.

Q. I want to call your attention to an item in the annual report of the company in 1955. Since this is in evidence, I'd like first of all to read it to the jury.

Mr. Alioto: "Note 2. As of November 30, 1955, the company acquired all of the assets and assumed all of the liabilities, with minor exceptions, of the Morton Packing Company in consideration of the issuance of the Morton Packing Company of 179,357 shares of the company's common stock. The excess of the fair market value, as determined by the board of directors being the fair market value at date of the acceptance of the company's offer by Morton of the shares issued over the net tangible assets as shown by the books of the Morton Packing Company has been shown on the consolidated balance sheet as good will, which the company intends to amortize in accordance with generally accepted principles."

Then, on the balance sheet, the good will item is set up, and it relates to Note 2; and I just read from Note 2. It's set up as $3,814,753.

By Mr. Alioto:

Q. Now, was there any discussion at the time of the ngotiations for the acquisition of the Morton Packing Company about setting up a $3 million good will value?

Mr. Schafer: Now, your Honor, I simply cannot understand what the relevancy is of what price Morton had to pay—

Mr. Alioto: I'll be glad to state it.

The Court: I don't know what it is.

Mr. Alioto: I'll be glad to state it, if your Honor please.

The Court: Go ahead.

[fol. 228] Mr. Alioto: This company in 1955 buys a company, and the board of directors make a determination that there is a good will value to this company of $3 million over and above the payment for the physical assets. Later on, it's going to be claimed—as a matter of fact, it's already claimed in part of the proceedings—that it was necessary to institute a sales below cost program to lose money in order to break into the business. Now, I wonder why—the question would be, the factual question would be, that if there was indeed a good will value of $3,800,000 over and above the physical assets, why any kind of an introduction program was necessary.

Mr. Schafer: Now, Mr. Alioto, if Continental was claiming that an introductory program at sales below cost was necessary, that's one thing. That's his claim. That's not Continental's claim.

Mr. Alioto: We've proved the losses.

Mr. Schafer: You haven't proved any losses in the relevant market in the area at all. We're talking about 1957, '8, '9, '60 in Salt Lake City.

Mr. Alioto: If your Honor please, I'm not going to argue the evidence, but I'll be glad to show that we've proved that Continental lost money in this area when they were selling pies at $2.55.

The Court: Well, I don't think we ought to argue that before the jury.

Mr. Schafer: Your Honor will be aware that accounting procedures dictate that you've got to put the money that you have to spend to buy something someplace. What they did apparently was they paid something for fixed assets, but that Morton Company was worth a little bit more than the fixed assets. It had some salesmen, it had some good will, it had a brand name, it had a little knowhow, it had all of those things that you put into the ball of wax that you buy. You buy something more than bricks and mortar. And you've got to put it someplace.

The Court: Well, good will means that the company is regarded favorably in the trade.

[fol. 229] Mr. Schafer: Continental would not have bought it if it didn't regard it favorably. There's no question about that.

The Court: All right. All right. Now, he offers this, in answer to the examination you put in. Somewhere in the record we have—I have heard it—that you had to have a promotion program, and there are costs involved in that promotion program, and it's relevant in this case. Now, he's offering this to suggest—what he's saying, really, is, in very simple terms is, "what do you need a promotion program for if this company has so much good will?"

Mr. Alioto: That's correct. And, therefore, there may be a motive other than promotion—there may be an ulterior motive—in accordance with our allegations if this is true. This is our point.

Mr. Schafer: He's saying just because you pay $3 million for good will you don't have to compete, you have such a wonderful company you don't have to compete in the market.

The Court: The objection is overruled, and you may proceed.

By Mr. Alioto:

Q. Mr. Anderson, do you recall any discussion about that $3,814,000 good will item?

A. According to the note you've read, it was the determination of the board of directors, and I did not attend the board of directors meeting.

Q. Quite aside from whether you attended the board of directors meeting, do you recall any discussion within the organization about that subject matter?

A. No, sir.

Q. Do you recall any discussion at a later time, approximately three or four years later, when they decided that maybe there wasn't that much good will involved after all in the Morton Company?

A. No, sir.

Q. You don't know anything about that subject matter?

A. What I've read in the annual report, which says that we've now invested more in assets than the good will that we bought. So they felt that under good accounting principles, they could write it off.

• • • • • • •

Redirect examination.

By Mr. Alioto:

Q. In connection, Mr. Anderson, with the statement that you developed this thing later, on, it is a fact, is it not, that [fol. 230] with the acquisition of the Morton Pie Company that you became one of the largest producers of meat and fruit pies in the country?

A. At the time of acquisition—incidentally, the Morton Packing Company, not Pie Company—frozen pies are a very small part. This was developed, really, after our acquisition. As far as its other frozen foods, no, it was not one of the largest.

Q. Let me just read this statement. In your annual report of 1955: "A new corporation, Morton's Frozen Foods, Inc. was organized, and the net assets of Morton Packing Company were transferred to it. By this step, we became on December 1, 1955, one of the country's largest producers of frozen meat pies and frozen fruit pies." Now, that statement was correct?

A. Yes. But—

Q. In other words, you folks didn't start from scratch?

A. Oh, no, sir.

Q. As the Utah Pie Company did, for example? You acquired another organization and became one of the largest producers by that acquisition; is that correct?

A. Yes, we did, although we've developed most of their products since the acquisition.

Mr. Alioto: I have no further questions.

Recross-examination.

By Mr. Schafer:

. . . . . .

By Mr. Schafer:

Q. Were there many competitors in the industry in 1955?

A. It was a new industry, Mr. Schafer, and I'm not sure how many competitors there were, but it was something that was just really starting about that time.

Q. Do you know whether or not it's a fact that many new companies have entered the industry since 1955?

A. Yes, sir, there have.

. . . . . .

DUANE S. HALVARSON called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Halvarson, would you be good enough to state your full name for this record, please?

A. My full name is Duane S. Halvarson.

Q. Mr. Halvarson, where do you reside?

A. In Los Angeles.

[fol. 231] Q. What is your present business or occupation?

A. Regional Sales Manager for Morton Frozen Foods.

Q. And for how long a period of time have you been the regional sales manager for Morton Frozen Foods?

A. Almost eight years.

Q. What is the region over which you have jurisdiction?

A. I now reside in Los Angeles and have jurisdiction over Southern California and Arizona.

Q. In 1958, '59, '60, and '61, did you have any jurisdiction over the Utah trading area?

A. Yes, I did.

Q. Specifically, did you have any jurisdiction over Utah, Idaho, and Southern Montana?

A. I did.

Q. Mr. Halvarson, I want to direct your attention to one line of questioning only, and that's with respect to documents that relate to fruit pies in your organization. Do you keep cost records segregated as to fruit pies in the Continental organization?

A. I have no cost records. I only have price lists.

Q. Do you have any records at all in the Los Angeles Office which reflect how your particular region or your particular district is doing in relation to the other country?

A. I have none.

Q. Do you have any notion, for example, whether you made money or lost money in the distribution of your fruit pies in the Utah area in 1958? Do you have any records that show that?

A. I have none.

Q. And have you ever seen any records that show that?

A. No, I haven't.

Q. And to your knowledge, then, the Continental Baking Company doesn't have any such records; is that it?

A. No, I have no records.

Q. Are any of the employees in the Western district compensated on the basis of a percentage of profits of their divisions?

A. They are compensated on a percentage of increase on our sales. Over—

Q. For example, your own compensation, Mr. Halvarson, without giving it to us in actual terms, but so far as formula is concerned, does your own compensation depend on whether you make a profit in your division or whether you increase your sales in your division?

A. Whether I increase my sales in my division.

Q. Regardless of what price? Is that it?

A. At the current prices that I sell the merchandise.

[fol. 232] Q. Would you have any records that would show, Mr. Halvarson, whether or not your company made any money in connection with its $2.55 price to the Safeway Company, about which there has been a considerable amount of testimony?

A. I have none.

Q. And you have never seen any?

A. I have never seen any.

Q. Has any superior ever told you that you were making a profit or a loss in your particular division?

A. I have never been told.

* * * * * * *

(Jury in the box.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Schafer: Your Honor will recall that we have some unfinished business left over with Mr. Kitchin, and Mr. Alioto and I have agreed, if it is acceptable with your Honor, that Mr. Kitchin can go on the stand first and interrupt Mr. Caldwell's examination, so that Mr. Kitchin could go back to the Morton production line. And Mr. Alioto—

Mr. Alioto: Excuse me. I suggest any further arrangements be discussed with the Court.

The Court: Very well. We have some unfinished business in chambers, I guess, haven't we?

* * * * * * *

The Court: All right, Mr. Schafer, you go ahead.

* * * * * * *

[fol. 233] Mr. Schafer: Now, in respect of Continental's legal objections to this line of interrogation, the grounds of those legal objections are:

First, it seems to me perfectly clear that this interrogation cannot be admissible on any theory of conspiracy between the Pet and Morton Companies in respect to the Safeway business. I think it just proves the absence of a conspiracy. I don't think it is offered for that.

Mr. Alioto: Excuse me. It is.

Mr. Schafer: I am sorry.

Mr. Alioto: It is in the sense that when you are competing against Pet you are offering a $3.10 price and when you are competing against Utah you offer a $2.55 price. Obviously it is offered to show that you were not competing as hard against Pet as you were against Utah Pie.

Mr. Schafer: We were competing against Pet, you concede that.

Mr. Alioto: No, I don't concede that at all. You could have this business if you wanted it.

Mr. Schafer: We are arguing now. I am trying to state my objection.

The Court: Go ahead.

[fol. 234] Mr. Schafer: In respect to the Patman Act charged in this case, we deem this interrogation irrelevant on that charge for these reasons:

(1) That Continental has never denied that during the course of the four years involved in this proceeding it has from time to time been able to charge for its product a higher price in San Francisco than it has been able to charge in Salt Lake City, that from time to time during the course of the four years there has been what the law conceives to be a discrimination in price between the San Francisco market and the Salt Lake City market. And that is all that this letter dated May 22, 1961 proves. A course of discrimination, your Honor, without an adverse effect upon competition is not a violation of the Patman Act. So we concede the discrimination from time to time during these four years. We have never conceded there was any

adverse effect upon competition at the primary level in this market.

Secondly, in respect to this interrogation respecting costs, Continental, in conceding that a discrimination has existed from time to time between the two markets, has never asserted that one of the defenses to that discrimination was cost justification. We have certainly never made that assertion, and that is all that this interrogation relates to, that Mr. Alioto is attempting to show that Mr. Kitchin can't cost justify the different quotations shown in May of 1961, the $3.10 quotation to Safeway and $2.55 quotation to Salt Lake City customers f.o.b. Watsonville dock.

We don't claim we can cost justify, that the discrimination that does exist from time to time during these four years is simply that there has been no adverse effect upon competition and, secondly, we were simply meeting competition in the Salt Lake market and having to price our products as low as we did.

Those are my objections.

Mr. Alioto: If your Honor please, first of all I don't know of any place in this record where counsel has stipulated that there have been, from time to time in the past four years, price discriminations within the meaning of the Act. So, first of all, may I inquire: Is it now stipulated between Continental and the plaintiff that within the four years immediately preceding the filing of this complaint there have been from time to time price discriminations made by Continental in which the lower leg of the price was in the Utah trading area and the higher leg of the price outside of the Utah trading area? Is that stipulated now?

[fol. 235] Mr. Schafer: The way to handle that, your Honor, I would submit, is this: that we have worked carefully with Mr. Caldwell, who is Mr. Alioto's accountant, and Mr. Caldwell has confirmed his schedule of prices, of Continental's prices, and he has worked up a schedule, and we have checked that and we have confirmed that that is correct; and that schedule compares Salt Lake City prices,

San Francisco prices, and Los Angeles prices, and the prices in the other markets in the Western States.

We would submit, your Honor, that the way to handle Mr. Alioto's request is simply to put that schedule in that both parties agree upon as to Continental's price, put that in evidence here as my exhibit or Mr. Alioto's exhibit, I don't care which.

The Court: It is coming in anyway. I don't see much of a concession in that. He is going to prove it on you.

• • • • • • •

[fol. 236] Mr. Schafer: If Mr. Alioto wants to go into this matter of costs of Continental by way of impeaching Mr. Kitchin, I have no objection to that, of course, I can't state an objection. But, your Honor ought to inform the jury that that is what the purpose of this interrogation is, that Mr. Alioto contends that Mr. Kitchin sought to assert a cost justification in his previous testimony and that now he is not trying to assert it, that that is what Mr. Alioto is trying to convince the jury of, and that is why we are going into this interrogation. It is not because Continental has ever claimed this is relevant to any issue in the lawsuit.

The Court: I don't think I want to get into that.

Mr. Schafer: I think the jury is going to be confused as to that.

The Court: I think they are going to be confused if I get into it.

Mr. Schafer: It is up to your Honor to guide the jury as to what the issues are.

The Court: That is the reason I said I didn't want to get into it. If I get talking to that jury about cost justification and say, now, this is what we are permitting Mr. Alioto to examine Mr. Kitchin about, and this other is not what we are permitting Mr. Alioto to examine Mr. Kitchin about, and Continental (Morton) has never asserted, and now concedes, there is no cost justification, that Mr. Alioto is entitled to go into this question—Mr. Kitchin raised the

question and Mr. Alioto is entitled to impeach him on that subject matter—

Mr. Schafer: That's right, sir.

The Court: (Continuing)—why, they won't know what I am talking about.

Mr. Schafer: I certainly submit to your Honor they will certainly know a lot more—

[fol. 237] The Court: Now, I put it plainly then, and I don't think I could put it any more plainly; and I don't think they would know what I was talking about.

Mr. Alioto: There is also the other issue as to the difference in cost between the 24 and 22, which goes to a lot of issues in this case, and not just cost justification.

Mr. Schafer: I can't think of what issue it goes to.

The Court: My position on that is that Mr. Kitchin, all through his examination, raised the question. Mr. Kitchin would go along pretty well until he got him down to the point, and then Mr. Kitchin would say: There are differences, there is this, and there is that. And he said, "I am not the accountant, and I don't know, but there are these things, there is the possibility."

Mr. Schafer: That is quite right. It is exactly what he said, your Honor.

The Court: He went all over the lot on that subject, and repeatedly.

Mr. Schafer: That is exactly what he said: There are formula differences, there are sales differences, and there are individual cost differences.

The Court: Yes.

Mr. Schafer: He didn't say there were cost differences amounting to 55 cents, or whatever it is.

The Court: Of course, there is a clear implication from what he said that he was talking about cost justification.

Mr. Schafer: I doubt the jury even knows of the existence of cost justification.

The Court: From a layman's point of view—and I am kind of a layman in this business, too—from a layman's point of view, when you are talking about your folks offer-

ing a price to Pet in San Francisco at $3.10 and in San Francisco for delivery to the people up here at $2.55, and Mr. Kitchin is examined on that subject, Mr. Kitchin says: The reason for this is—and then he says there are the differences.

[fol. 238] Mr. Schafer: That is right.

The Court: Differences in size cost more, differences in formula cost more. Why, you have the cost justification all over the lot.

Mr. Schafer: He didn't say it costs as much as the difference. He just said it costs more, and he will say it again.

Mr. Alioto: Mr. Schafer, I asked him specifically three or four times, "Will you concede that these two prices are different?" He never did do that. He always talked about formulas.

Mr. Schafer: There is no question, the price is different. There is no issue. The price says on its face $3.10 a dozen. There is no issue.

I want to point out the third reason why it is not relevant. I have stated my objections on the conspiracy charge, but under the Patman Act you haven't got the jurisdictional requisites unless you have two comparable sales, and it is clear on the record you haven't got two sales on the Safeway. It was just an offering for sale. They never made a sale. And therefore under the Patman Act you haven't got sales that you can compare prices on. You have got to have sales. You can't have an offer for sale and a sale and show discrimination.

The Court: How about that.

Mr. Alioto: That is true so far as the Robinson-Patman Act is concerned, that you have to have two sales, but we are arguing here that prices were offered at this time in competition—how they were offered in competition to the Utah Pie Company and as to the manner in which they were offered in competition to Pet. One of the issues this is relevant on is the question of whether or not they actually competed as hard against Pet as they did against Utah Pie. I don't think there was any predatory pricing against

Pet, and I think this will show it. But I think that there was predatory pricing against Utah Pie, and I think this will show it.

In addition to that, counsel is asserting that he is only meeting competition in the Utah area. The competition he is meeting is, by his admissions, as I understand it, a $3 price—$3.10 price for Frost 'N' Flame in the Utah area. [fol. 239] Mr. Schafer: He is saying more than that, more than that, but that is part of it.

Mr. Alioto: He is saying $2.85 is the same as $3.10. This is going to show that isn't so, that $2.85 isn't the same as $3.10.

Mr. Schafer: No cost analysis is going to have anything to do with whether or not $2.85 is the same as $3.10. That has nothing to do with cost. That is price, and price is price. What does the customer pay? It is irrelevant what the costs of manufacturing are.

What the Patman Act is concerned with is the two prices, and the costs involved in the course of getting those two pies to the market has nothing to do with the Patman Act.

In regard to this claim of soft versus hard competition, that clearly is a claim—Mr. Alioto is suggesting this interrogation is admissible on the conspiracy issue. I think that is absurd on its face, but if it is being offered on a conspiracy theory, then clearly this element of cost justification has nothing to do with it, so he jumps around but can't find any way to bring it together in one kind of coherent admissibility.

On the Patman Act it falls flat on its face because you haven't two comparable sales. On conspiracy it falls flat because it is just absurd to suggest that you would try to get some business away from Pet but you really wouldn't try very hard, so that is not really competition.

I don't think Mr. Alioto really means that, frankly.

Mr. Alioto: I really mean it, and you will see some of the evidence developing here shortly. But there were two sales in the Utah area. There was a sale at $2.55, which you say is $2.85, and we are comparing that with a sale of

$3.10 of Frost 'N' Flame and a sale out in California of $4, with an advertising allowance, at or about the same time. And you are saying that that $2.85 and $3.10 are exactly the same price.

Mr. Schafer: That's right.

Mr. Alioto: Well, on its face, it obviously isn't the same price.

[fol. 240] Mr. Schafer: Well, it is the same price in terms of the competitive marketing facts. Is it equally desirable to a customer? Do you have to sell at 2.85 in order to meet the guy with the $3.10 price? If the guy with the $3.10 price has a bigger pie, delivery advantages, other advantages, you have got to come down underneath $3.10 in order to get any business, and that is what the condition is. But none of that has anything to do with what it costs you to manufacture the Bel Air pie, if you can get business away from the Pet Company.

Mr. Alioto: It has a lot to do with it.

Mr. Schafer: It hasn't. What you are doing is measuring numbers, $3.10 and $2.85, are they equal? But whether or not there is any cost justification between an offer to Safeway and the cost of the Morton 22-ounce pie has nothing to do with the issue of whether or not the $2.85 is comparable to $3.10. The cost of manufacture hasn't got a thing to do with the price.

The Court: I think I ought to see the evidence, frankly, I think I ought to see the evidence.

Mr. Schafer: On the evidence, your Honor, it isn't going to mount up to 55 cents. That is conceded by everybody.

The Court: I don't know what it is going to do, but these theoretical discussions in chambers put me at a disadvantage, because I don't know this field that way you know it; I am not sure I understand it. But I do after I see the evidence. I get that evidence in, and you submit it to me.

Mr. Alioto submits it to me, and then I know what I am talking about. Until I see that evidence I don't think I want to make a ruling on it.

The ruling I am going to make is that your objection is overruled and we will proceed with the evidence, and some-

time along the way, of course, you will have an opportunity to argue the question of law.

• • • • • • •

[fol. 242] Mr. Schafer: Continental objects, your Honor, to the interrogation on the grounds of irrelevancy to the legal issues of the case. Continental has not asserted the defenses that this kind of interrogation would be relevant to. And Continental submits that it's not relevant to any of the legal issues stated by the plaintiff.

The Court: The objection is overruled. You may proceed.

[fol. 243] William R. Kitchin, recalled as a witness on behalf of the plaintiff, having been heretofore duly sworn, testified further as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Kitchin, at the last session, to orient this discussion, you recall we had discussed your $3.10 offering to Safeway in San Francisco and the $2.55 sale to Safeway in San Francisco for distribution in Utah. We also discussed the California price of $4.00 at or about this time, as evidenced by the Fox Market invoice, Plaintiff's Exhibit 10, as against this same $2.55 Safeway price for distribution in Utah. Now, at that time we had some questions about the differences between the pie that was being offered at $3.10 and the pie that was being offered at $2.55; and you will recall that you stated that this was a 24-ounce pie and that this was a 22-ounce pie. Do you recall that?

A. Yes.

Q. That factual situation?

A. Yes.

Q. Now, I asked you at that time whether or not—well, let's just start all over again on this question. Do you concede now that the $3.10 price and the $2.55 price is a rural

difference, even after you take all of the factors under consideration?

A. You mean the cost factors?

Q. Yes.

A. Yes, I would like to say first—

Q. Is the answer yes?

A. Yes. There is a difference.

Q. All right. Now, what do you want to say, Mr. Kitchin?

A. I said the other day that we had made several proposals to the Bel Air people, Safeway people, for the Bel Air label. I wasn't sure what formula it was, and I would like to check this thing. Now, this was checked, and we found out, as it stated in the letter, there is a difference in the formula. There is a difference in the fruit content in proportion to fruit, and there is also a difference in the packaging cost, and also there was a difference in the labor cost, there is a difference in the dough. We have never known what the Utah—the Bel Air—formula is. We don't know today. So some difference in the cost here allowed for a difference that could come along later in estimate cost.

Q. Excuse me, Mr. Kitchin. If you have never received the Safeway formula on Bel Air pies, how do you know that there is a difference?

A. Well, number one is we made several checks of the formulas in our laboratories, which is stated in this letter.

Q. How?

A. By having our research people take these pies and tear them down and weigh out the dry fruit content, weigh [fol. 244] out the proportion of lard we think, the richness of the crust, and things like that that you have to get into in this business. We also estimate in our best knowledge that they use a lesser thickness of crust than what we use, and if you use this and you have a richer crust in our business, you cannot run the speeds that you can ordinarily run through using the type of crust that we use under the Morton label. You have to make allowances here for increased labor cost. And as speeds go down, costs go up.

Q. Now then, have you in response to the order of the Court secured by telephone certain information that pur-

ports to set out your actual cost breakdown on Morton 22-ounce fruit pies, as against your cost estimates on the 24-ounce Bel Air fruit pies for Safeway?

A. Yes, we have.

Q. And is this document which has been marked plaintiff's Exhibit 32 for identification a document which sets forth that difference?

A. Yes, that's correct.

Q. And was that document physically prepared by you?

A. This document was prepared by our accounts in New York. I sat down with our accountants at the time. We make difference projections, different estimates; we make adjustments; and this thing was called over the telephone as requested.

Q. Excuse me. What I'm asking, Mr. Kitchin, the handwriting on this document, whose is it?

A. That's mine, yes, sir.

Q. And you secured it by the telephone and transmitted it to this page?

A. Yes.

Q. I understand now that those original documents are on their way out by Airmail and that they will be made available to us?

A. I believe that's correct.

Q. Now then, even on the basis of what you received over the telephone, how much a difference is there between your actual costs on the Morton 22-ounce pie on the one hand and your projected or estimated costs on the 24-ounce Bel Air pie for Safeway?

A. Well, there is a 37-cent difference on the apple.

Q. On apple?

A. Yes. Now, there is only—

Q. Excuse me, sir. Excuse me, sir. Even on what you admit, before we have any examination on it, even on what you admit, there is a difference in price of 18 cents per dozen? Is that correct?

Mr. Schafer: Difference in price, Mr. Alioto, or difference in cost?

The Witness: Difference in—marginal difference.

[fol. 245] By Mr. Alioto:

Q. Well, there is a difference between your actual cost on $2.55 and your proposed—and your estimated costs on the $3.10 factor of 37 cents?

A. Yes.

Q. So that would still leave a difference of 18 cents, would it not, between this $2.55 price and this $3.10 price, even on your figures?

A. Yes. Let me just check that figure, if I can, Mr. Alioto. That is incorrect. That 27 is incorrect. There's a 27 difference. Not 37. That's incorrect. I'd like to show you.

Q. All right. Let's get this up first, and then examine it, because there are a few items I want to talk about. So even on your figures, that's 27 cents. That would be a difference of 28 cents?

A. Yes.

Q. 28 cents per dozen?

A. Yes.

Q. Now then, let's analyze a 24-ounce pie as against a 22-ounce pie for just a minute. The basic difference is in the ingredients, is it not?

A. 24 to—24 to 22, yes, it is, Mr. Alioto.

Q. The pies actually have the same size, don't they, when you look at them?

A. Yes, that's correct.

Q. The pies go in the same kind of box, the size of box?

A. That's correct.

Q. Same size of box?

A. That's correct.

Q. They go into the same size of shipping cartons—

A. That's correct.

Q. Or shipping cases?

A. That's correct.

Q. Now, is there an actual difference in appearance between the 25-ounce pie and the 22-ounce pie that the housewife could detect, as distinguished from a trained eye?

Mr. Schafer: What is this relevant to, your Honor?

Mr. Alioto: Well—

The Court: Overruled.

The Witness: In observation and looking at the pies in the cabinet, the same size pies, obviously the pies appear to look the same.

Q. Appear to be the same.

A. Except for the identification. The net weights.

By Mr. Alioto:

Q. Now, when you take the pies out of the box and show them, except to a trained eye, do they look any different? [fol. 246] A. Well, the difference, of course, is the taper in the pan, the size of the pan. And this is the difference. If you look down on the pie, the O.D. across the top is usually the same.

Q. All right.

A. In our company it's the same.

Q. Now then, in order to get in to extra ounces of, say, the fruit, you have a crust which is thinner, don't you, rather than thicker?

A. No, no. Not necessarily so. It would be in the taper of the pan in which you allow for the volume difference.

Q. Let me ask whether or not the crust in the 22-ounce pie, your regular Morton Pie, is thicker or thinner than the crust you had proposed to use in the 24-ounce Safeway pie?

A. Well, in this projection we had estimated at this time that the crust would be the same.

Q. The crust would be the same?

A. Yes, in this pie.

Q. What would be different?

A. The difference would be the fruit content in volume of fruit that would be placed in a container. There's more going into the Bel Air in the container by weight than was in a Morton, plus the fact there was more fruit in proportion in its mix, you see. There are two differences here.

Q. Now, then, on this cost figure of yours, or analysis which you received, Mr. Kitchin, over the telephone, you show a packaging cost. Is this per dozen?

A. Yes, it is.

Q. A packaging cost—

A. That's correct.

Q. —of 77 cents; is that correct?

A. That is correct.

Q. And you show a packaging cost of 72 cents?

A. That is correct.

Q. Now, what portion of that cost is the actual package, the actual box? All of it?

A. No. It's made up between the pan—this is the total packaging cost, as we call it—it's made up between the pan, the box, and the aluminum—that's what the pan, the aluminum is for—and the shipping case. There's three different items.

Q. In any event, this is just a cost of material?

A. Yes.

Q. Didn't you say earlier that the box and the shipping case are identical?

A. Yes. They're identical in substance, yes, but not in cost.

Q. Now, how about the pan? Is the pan identical?

A. No, the pan is not identical.

Q. Now, what is this pan, incidentally?

A. Well, the pan is a little pan that the pie rests in.

Q. This is an aluminum foil thing?

A. Yes.

Q. Isn't that identical in cost?

[fol. 247] A. Not necessarily so, no, because one would have more foil than the other. It's bigger.

Q. Would you tell me why the box which is the same for the Bel Air pie should cost you more than the box you use on the Morton pie?

A. Well, in buying boxes in the industry, some people have four colors, some have five. Some even have six. There is a cost difference in the number of colors that they

have. There also is a cost difference in the thickness of board. Some can use a 15 point board, some can use a 16, some can use an 18. There is also a difference in the volume of board that you buy. In other words, we buy in quantities of several million. In this particular case, and I could check and find out, the Safeway people handle their own box purchasing. And it was in lesser quantities. So it's normal in a lot of businesses, the more you buy of something in larger lots, the cheaper price you get. Ours was the cheaper price. These costs here are estimated costs to allow for a larger—I mean, a greater cost box.

Q. On your proposal weren't you going to buy the box from Safeway?

A. No, sir, we don't. We have to allow for the cost of the box in here, which was more expensive. You see, a lot of times in private label packing, the principal retains the box, the plates, and has the right to say where they will be used, and he can switch from one manufacturer to another much easier than having the plates in a box that's owned by the manufacturer.

Q. Mr. Kitchin, in private label packing, it's also possible for the manufacturer to buy the box when he buys his other boxes, isn't it?

A. Oh, of course.

Q. Of course. So in that situation, if you're buying the boxes on top of your volume, it would be exactly the same price?

A. Oh, no, no, sir.

Q. Why not?

A. Because you cannot run them through the same press. When they go through the lithograph, you cannot run a Safeway board behind our board. Besides that, the Safeway people, they have preference to another manufacturer of boxes than we do. So there are a lot of differences here that have to be taken into consideration.

Q. If you bought them from exactly the same manufacturer, would there be the kind of difference which ap-

parently is embodied in this 77 cent figure as against the 72 cent figure for Morton?

A. No.

Q. Of course there wouldn't.

A. Not at all.

Q. It would be less, wouldn't it?

A. No, it would not. I'm answering you truthfully as this thing happens in the industry. And it would not, because of difference in color, difference in gauge, difference in run, and it causes the difference in these costs.

[fol. 248] Q. Let me put it this way, Mr. Kitchin, so we'll have it very clear in the record, and I think this will make it clear. Is it not a fact that if you purchase the boxes for Safeway, using your volume position, and you purchased it from the same manufacturer from which you purchased all of the other Morton boxes, if you did it in that fashion, that there would be a lessening of this difference between 77 cents and 72 cents, as you have on this exhibit? Now, isn't that so?

A. No, sir.

Q. You say there cannot be?

A. No, sir. It cannot be so, if they have a difference of colors and can't run it through the same press, because the manufacturer of the boxes has to tear his presses down. It sometimes takes him as long as 24 and 48 hours to set up these presses again. And if he does this, they have to account for these costs somewhere. And they're passed along to people like ourselves. And this is the way the thing happens.

Q. Mr. Kitchin, is this 77 cent figure based upon using the same manufacturer as Morton uses, or a different manufacturer?

A. That has not been established. We were only negotiating with the Bel Air people at this time.

Q. I'm asking you what this figure is based on. Is it predicated upon the box being purchased from the same manufacturer you use, or is it predicated upon the box being purchased from Safeway's manufacturer?

A. This was based on, this was based on, as I recall, the same box people, the Bel Air people, who have preference for their own supplier.

Q. And that would be a higher price than if you had based it upon buying the box from your manufacturer?

A. Yes, because of the difference in volume and the difference in board and the many things that I have mentioned.

Q. Therefore, what I said a moment ago was correct, is it not, that if you would use your own manufacturer on this 77 cents, instead of Safeway's, it would have been a lower figure?

A. Absolutely not.

Q. All right.

A. Absolutely not, because of reasons I've stated.

Mr. Alioto: We'll offer this in evidence, if the Court please, as the plaintiff's next exhibit in order.

Mr. Schafer: Same objection as to relevancy and materiality.

The Court: Same ruling. The objection is overruled and the exhibit received in evidence.

[fol. 249] (The exhibit marked Plaintiff's Exhibit No. 32 for identification was received in evidence.)

* * * * * * *

Q. Incidentally, where is Mr. Vail right now?

Mr. Schafer: What's that relevant to, your Honor?

Mr. Alioto: I just asked him a question.

The Witness: I don't know.

The Court: I can see why it's relevant, and you can see why.

Mr. Schafer: No, I frankly cannot.

The Court: Well, the objection is overruled.

The Witness: I don't know where Mr. Vail is right now.

By Mr. Alioto:

Q. Mr. Vail is the chief executive officer in charge of pricing the frozen pies, isn't he, and has been?

A. Well, Mr. Halvarson in the local area makes his own prices and sets up his own scheduling of this and price allowances and touches base in the home office.

Q. In other words, Mr. Halvarson can make a price without talking to Mr. Vail?

A. Mr. Halvarson has to touch base with the right office on prices.

Q. Touch base with Mr. Vail, is that it?

A. Not necessarily Mr. Vail, no. We have product managers in our company.

Q. Then you're telling us that Mr. Halvarson can make a price by touching base with somebody in New York other than Mr. Vail?

A. Yes.

Q. And is that the way it's generally done, or is Mr. Vail the chief pricing officer?

A. That's the way it's generally done. With the product managers.

Q. Who is the chief pricing officer so far as frozen fruit pies are concerned?

A. Well, the product managers are assigned to specific amounts of our items. For instance, it could be a fruit pie man, it could be a meat pie product manager, dinners, and so no. And these people set their prices and meet certain conditions they have to as this thing moves along.

[fol. 250] Q. And Mr. Vail has nothing to do with that situation?

A. Mr. Vail does not get into the local pricing action as it happens as we go along in the daily pricing and that type of thing.

Q. Are you telling me, for example, that in connection with fixing these prices in Utah, the Utah distribution, this $2.55 price of Mr. Vail had nothing to do with that?

A. I'm not familiar if he did or not. I don't recall if he did or not. I was in the area at the time. I could have had

something to do with it. One of our product men could have had something to do with this price. And we travel a lot, spend a lot of time on the road, spend time away from the office.

Q. Mr. Vail is the president of this company?

A. That's correct.

Q. And Mr. Vail is the chief executive officer of the Morton Division, Frozen Foods Division, isn't he?

A. That is correct.

Q. And he is the man ultimately responsible for whatever happens in connection with the production and distribution of frozen pies, isn't he?

A. Yes, that's correct, but he also has people to help him make pricing structures and prices in the local areas. And no one man can keep up with this thing, of course.

Q. Now, Mr. Vail is presently—I mean offices in New York does he not?

A. Yes, that's correct.

Q. And he's in good health, isn't he?

A. I assume this morning Mr. Vail—

Q. I mean, he's available to travel? There's no reason why he can't travel to Salt Lake City, is there?

A. I don't know of a reason whether he can or can't.

Q. All right. Certainly, everything you did in connection with the Safeway contract was cleared with Mr. Vail, wasn't it?

A. Yes. I sent Mr. Vail a copy, and also our regional sales manager, Mr. Halvarson, a copy of this contract.

Q. And I take it that when you set this $3.10 price for the offering to Safeway, that you checked that with Mr. Vail?

A. No, I didn't. I did not check with Mr. Vail.

Q. Did you inform him?

A. No, I hadn't.

Mr. Alioto: We have no further questions of this witness.

Cross examination.

By Mr. Schafer:

Q. Do you recall, Mr. Kitchin, that your deposition was taken in this action?

A. Yes.

[fol. 251] Q. That was in New York City?

A. Yes.

Q. Do you recall at the same time that Mr. Vail's deposition was taken in this action?

A. Yes.

Q. Would you describe what a deposition is?

A. Well, a deposition is—you make statements and answer the questions from an attorney in regard to business, the business climate, and the questions he had in reference to any particular thing at the time.

Q. Who asked the questions of you and of Mr. Vail at those depositions in New York City?

A. Mr. Bertain.

Q. This is Mr. Bertain here at the counsel table?

A. Yes, it is.

Q. The record shows, Mr. Kitchin, the $2.55 price that Mr. Alioto was alluding to f.o.b. California lasted about two or three weeks; and my question is, does Mr. Vail pass upon all of the short term price promotions that the Morton Company has to offer throughout the United States?

A. He certainly does not.

Q. That is one of the functions, I take it, of a product manager?

A. That is correct. That's one of the reasons why you have product managers.

• • • • • • •

Redirect examination.

By Mr. Alioto:

Q. In that connection, Mr. Vail had preceded you by several visits to the Carnation Company, hadn't he?

A. I do not know this, Mr. Alioto.

Q. Didn't he tell you that?

A. He told me to stop by and see these people, he had heard that they had some production, available production, facilities.

As I said the other day in testifying, I am looking for them all the time, and if I could work out a price and put [fol. 252] our product in there, and they would pack it on our formula, and we could do business cheaper and take advantage of volume on the West Coast, that was my discussion with them, as well as other people. We pack in a plant—we pack in one plant where we are in competition with the packer and we are in competition with eight other people that pack in this plant. I mean, this is done in our industry.

Q. Fruit pies?

A. No, not fruit pies at this particular time, but there have been fruit pies in the plant.

Q. Now, let's stay on the subject of Mr. Vail for awhile, and then we will get to this other subject and see if we can't stay right with it.

Mr. Vail had been negotiating with Carnation Company from time to time for approximately five years to enter into this co-packing arrangement, hadn't he?

Mr. Schafer: Your Honor, I object to that characterization of the record. The deposition of Mr. Vail has been taken by the plaintiff. They know all the facts. On that deposition Mr. Vail testified—

Mr. Alioto: I didn't take Mr. Vail's deposition.

Mr. Schafer: Mr. Bertain did.

Mr. Alioto: That is correct. I certainly have a right to ask—

Mr. Schafer: You cannot assume facts flatly contradicted by the record. The record is that Mr. Vail called in May of 1962 on Carnation to see if they would be willing to work out a co-pack, and that is what the record is. And to characterize it as five years of continual negotiations is flatly inconsistent with the sworn testimony under oath of Mr. Vail.

Mr. Alioto: If your Honor please, we have had sworn testimony under oath of a lot of people.

Mr. Schafer: All of which is true.

Mr. Alioto: Like the General Electric affidavits, all of which are true.

Mr. Schafer: I don't know anything about the General Electric affidavits.

[fol. 253] Mr. Billings: I move to strike that. That is irrelevant and immaterial, improper characterization of counsel. What General Electric affidavits have to do with this case, I can't understand.

The Court: The objection is overruled, Mr. Billings. The objection is overruled, Mr. Schafer. You may proceed, Mr. Alioto. This is cross-examination.

By Mr. Alioto:

Q. I was asking the question: Mr. Vail had for a considerable period of time before your visit been negotiating with the Carnation Company to make this co-packing arrangement, had he not?

A. This, to my knowledge, is not correct.

Q. Wasn't he negotiating with them in June of 1957?

A. I'm not aware if he was or he wasn't.

Q. When you say "to your knowledge" it is not correct that he had been negotiating before, do you have any knowledge that there was any negotiation between Mr. Vail and Carnation before that time?

A. I don't recall his negotiating with them.

Mr. Alioto: We will offer into evidence, if your Honor please, a document which has heretofore been marked as—let's mark it as our plaintiff's exhibit next in evidence.

(Plaintiff's Exhibit No. 33 was thereupon marked for identification.)

Mr. Alioto: This is Plaintiff's Exhibit 33 for identification, which we offer in evidence.

Mr. Billings: Your Honor, I will object to that unless Mr. Alioto also offers the balance of the minutes from which that document was taken. This is one of the pages of the minutes of the Carnation Company Frozen Food Committee. The whole set of minutes has been submitted to Mr. Alioto. He has selected one page from those minutes, and I ask that all of them be put in.

Mr. Alioto: This must be some kind of a novel objection in the law, that you have to put in five years of minutes if you want to put in one of them. I offer this. We will submit that objection.

The Court: The objection is overruled. The exhibit is received.

If you have something in the record you want to produce, you can do it on your own.

• • • • • • •

[fol. 254] Mr. Schafer: May I state an objection and a motion to strike, your Honor, in respect to that squib from 1957. The charge in this case is that these three companies have conspired to drive the plaintiff out of the business. The fact of the matter is, as the record shows, the plaintiff wasn't even in the business in 1957, so, I cannot conceive how this squib in 1957 could be considered relevant to the charge that these three companies conspired to drive the plaintiff out of the business, when the plaintiff didn't come into the business until 1958.

Mr. Alioto: One of the elements of conspiracy, of course, is elimination of competition between two dominant companies.

Mr. Schafer: The charge is not that, your Honor. The charge precisely is they tried to drive this person out of business.

Mr. Alioto: Yes, that is it exactly.

The Court: I am not going to tolerate arguments before the jury. You stated your objection. Mr. Alioto is answering.

Mr. Billings: May I also make an objection, your Honor, on behalf of the Carnation Company on the ground that these minutes—other than the objection already made—there are two dates, one 1957, June, prior to the time the plaintiff went into business, and the other, June 28, 1962, almost a year after this complaint was filed. I contend those are irrelevant and immaterial.

The Court: All right, Mr. Alioto.

Mr. Alioto: We assume—this is in one part of the period, and in another part of the period they are discussing the same thing. The witness testified in his examination he had some discussions with Carnation in 1961. He has attempted to correct it as of this morning only. Your Honor, of course, is familiar with the law in conspiracy cases that we are entitled to go back to a period of time just before the plaintiff got into business to show the relationship between the parties. It was decided in the Continental Ore case by the Supreme Court June 25, 1961. It is being offered on that basis and also it gives the inference of continuity of negotiations during that period of time.

The Court: The objections are overruled. You may proceed.

[fol. 255] Mr. Schafer: May I state, your Honor, that I meant to state the same objection Mr. Billings stated, and Continental does make that objection.

The Court: Overruled.

• • • • • • •

Q. And you told counsel, if my notes are correct, you couldn't get together in any way?

A. That is correct.

Q. What did you mean by that?

A. Well, there are basic things you have to do when you talk with people about a co-pack arrangement. You want them to pack your pies, you would like to see how they are

going to pack them, you would like to see their plant, you would like to take a look at their equipment they are using, and the laboratory setup, and many things that have to be done. And we went in—I went in and talked about this situation.

[fol. 256] The Carnation people said, "Well, we don't know if we can handle your business or not. We don't know if this thing makes sense. You give us your formulas, and we will quote you a price."

You don't go all over America giving your formulas away that you have worked on years and years to produce.

Mr. Alioto: That is not responsive.

The Court: The objection is sustained. The voluntary statements of the witness are stricken from the record. The jury is instructed wholly to disregard them. Answer the questions, Mr. Kitchin.

* * * * * * *

[fol. 257] GRANT R. CALDWELL resumed the stand and testified further as follows:

Cross examination.

By Mr. Lamb:

Q. Mr. Caldwell, I show you Plaintiff's Exhibit No. 27 in evidence and ask you to take a look at that document. What is that document?

A. It is a study indicating computed net profit or loss per dozen of apple, cherry, boysenberry, and peach frozen pies, based on a weighted average product mix and absolute net prices.

Q. Who prepared that document?

A. I prepared this document.

Q. Mr. Caldwell, is it a fact that you are regarded as an antitrust accountant expert?

Mr. Alioto: Now, if your Honor please, how Mr. Caldwell is regarded would be for some third person to say, some third party.

The Court: Yes. It is calling for a conclusion of what is in the mind of somebody else. Objection is sustained.

By Mr. Lamb:

Q. Mr. Caldwell, have you participated in many antitrust proceedings?

A. I have participated in some previous, yes, sir.

Q. Have you been the antitrust accountant for Mr. Alioto?

A. Not constantly. Others have handled some cases for Mr. Alioto in this area.

Q. You are representing him now in some other proceedings besides this case?

A. I am working with Mr. Alioto on another case, yes, sir.

Q. You are familiar with antitrust accounting?

A. Yes, sir.

Q. In preparation of Plaintiff's Exhibit No. 27, Mr. Caldwell, what did you use as a source of information?

A. Would you wish me to explain each item, Mr. Lamb?

Q. Well, let me take you through. First, before I take you through them, is it normal practice for a corporation to have a daily profit and loss statement?

A. I would say that it is not normal practice.

Q. Generally, profit and loss statements are made for what intervals?

A. Ordinarily on a monthly basis, or on an annual basis. I think there are some banks that compute daily running balances.

Q. Well, is Plaintiff's Exhibit No. 27 a profit and loss statement?

[fol. 258] A. Mr. Lamb, it purports to be the net result based upon the net absolute prices offered, which was compiled from the net price study that was supplied to each

of the defendants early in January. That information was taken from their price lists and their deal sheets. The manufacturing costs were taken from the information furnished us by each of the defendants.

Q. Wait a minute, Mr. Caldwell. I will take you down each one of these columns, because I think there is some very great significance attached to each one of them.

Is this an attempt to have a daily profit and loss statement?

A. No, sir. I would say that it purports to reflect the net result if this product had been sold at the prices offered on these various dates.

Q. Where did you get those dates?

A. The dates were taken from the price lists. We used the price lists for apple throughout that entire period, predicated upon this net price study which, as I say, has been previously furnished.

Q. In other words, on each of these dates there was a price announcement on apple?

A. That is correct.

Q. Is that correct?

A. Yes, sir.

• • • • • • •

Mr. Alioto: Excuse me, Mr. Lamb. This is extemporizing with this "dissimilar prices," and editorializing that is going on here. He can read the exhibit, if he wants to.

Mr. Lamb: If your Honor please, the column says "Weighted Average Net Sales Price."

The Court: Mr. Lamb, you know we never permit argument to the jury until the time for argument arrives. Don't argue that exhibit to them.

• • • • • • •

[fol. 259] By Mr. Lamb:

Q. Mr. Caldwell, I direct your attention to the first line.

A. Yes, sir.

Q. Which states the effective price date of January 18, 1958.

A. Yes, sir.

Q. What is the price of apple?

A. $4.92.

Q. And you took that from an apple announcement on that date, is that correct?

A. Yes, sir.

Q. Where did you get the prices for cherry, boysenberry, and peach?

A. It is the prices they were selling at at that same period of time.

The Court: By "they," you mean whom? Who are "they"? I don't know who you mean.

The Witness: The cherry, boysenberry, and peach were selling at these prices on January 18, 1958.

By Mr. Lamb:

Q. But they did not change their prices on that particular date, although apple did, is that correct?

A. Well, there are some instances where they all changed on the same date. There are some instances where they did not. That would be contained in the net pricing study.

Q. Now, Mr. Caldwell, will you turn to the second sheet.

A. Yes, sir.

Q. And tell me what that second page is.

A. The second page is the product mix used in arriving at the weighted averages. In other words, it is predicated upon the fact that apple would sell for—that in any given period of time there would be 50 per cent more apple sell, 30 per cent cherry, 18 per cent boysenberry, approximately 5—something lesser on the peach.

[fol. 260] Q. Where did you get that product mix?

A. That product mix was furnished me by Mr. Bye of the Carnation Company.

Q. In other words, that is a product mix of the Carnation Company and not a product mix of the Pet Company?

A. It possibly could be of the Pet Company.

Q. Is it or isn't it a product mix of the Pet Milk Company?

A. It was not furnished me by the Pet Milk Company. It was furnished me by Carnation Company, which I accepted as being representative.

Q. Did you ever ask the Pet Milk Company for their product mix?

A. I am reasonably sure that that request has been made, Mr. Lamb, from various—previously there have been a lot of requests made—

The Court: Well, now, Mr. Accountant—we all know that the accountant doesn't request these things. The attorney requests these things. I don't suppose this accountant—what is your name?

Mr. Lamb: Caldwell.

The Witness: Caldwell.

The Court: I don't suppose Mr. Caldwell requests anybody to provide anything. The attorneys do that.

By Mr. Lamb:

Q. Mr. Caldwell, you saw fit to use the Carnation mix in order to make the tabulations in the Pet exhibit, is that correct?

A. Yes, sir.

Q. All right. Then let's assume—let's proceed with our interrogation—

Mr. Lamb: Later, your Honor, I will make a motion with respect to that.

The Witness: I might add this, Mr. Lamb, in that regard, that this schedule was originally prepared, not in as complete a form, it was originally prepared and furnished to each of the defendants early in January. At that particular time there seemed to be some objection to not weighting the prices. Actually, after giving effect to this weighting, there really wasn't a substantial difference, if no weighting had been applied.

[fol. 261] Q. All right, now, Mr. Caldwell, let's return to the first line. In the sixth column you show, "Weighted Average With Net Sales Price."

A. Yes, sir.

Q. Now, that figure was arrived at by what process?

A. You would take—in 1958 you would apply 50.4 per cent times the apple price, 29.5 per cent of the cherry price, 18.3 per cent of the boysenberry price, and 1.8 per cent of the peach price.

Q. So you took the Carnation product mix and arrived at a weighted average net sales price for Pet of $4.97?

A. Yes, sir, which exceeds the price of apple, boysenberry, and peach, which are big sellers.

Q. Now, Mr. Caldwell, you have a series of colums here which you call, "Manufacturing Cost Per Dozen."

A. Yes, sir.

Q. Of apple, cherry, boysenberry, and peach. And I direct your attention to the first figure in the seventh line; and state for me what that is.

A. That is the cost of manufacturing apple pie, as furnished us by the Pet Milk Company.

Q. What kind of a cost is that? Is that a standard cost?

A. I assume that is a standard cost, which is normal procedure in accounting.

Q. Mr. Caldwell, I show you Plaintiff's Exhibit No. 30 and ask you what that is.

A. This is the costs furnished us by the Pet Milk Company.

Q. What kind of costs? What does it say up at the top?

A. "Annual Standards, Fresno Plant, Pet-Ritz 8-inch 24-ounce Peach Pie."

Q. So these are standards costs?

A. Yes, sir.

Q. And you used this in making your tabulations of the costs that appear in the first line? In other words, this 3.6076 came from this sheet for 1958; is that correct?

A. Yes, sir, that is correct.

Q. What are standards costs?

A. Standard costs are predetermined costs ordinarily based upon actual operating experience in the past for known factors and on the indirects that goes into the standard cost, it's ordinarily predicated upon a budget projection into the future.

Q. In other words, the costs that you used were not the actual costs? They were the projected costs?

A. I would say this, Mr. Lamb, in connection with computing standards, that one of the big factors, of course, is labor. Labor is generally pretty well predetermined and it can be adjusted from time to time for price increases. It's not difficult to arrive at an actual labor cost.

* * * * * * *

[fol. 262] Mr. Alioto: I'm going to object to this philosophical direction as highly irrelevant. I don't see that it's relevant to any issue in this case.

Mr. Lamb: May I state the relevance?

The Court: You may proceed. The objection is overruled. You don't need to state it. Go ahead with your examination.

Mr. Lamb: All right, your Honor.

By Mr. Lamb:

Q. If you had available actual costs—well, let me rephrase that—as an accountant, if you have actual costs and had standard costs, which of the two would you use in order to properly advise your client with respect to what his profit or loss was? Which figure would you use? Actual or standard?

A. In some instances they may the same. If there were a difference, of course, you would naturally use the actual costs.

Q. You would use the actual?

A. Yes. However, I would say, Mr. Lamb, that certainly in this area it would be a very unusual situation or an impossibility to arrive at an actual cost; but standards

are based upon the best available accounting data that the company has at any particular period of time.

Q. Mr. Caldwell, did you have access to the cost records of the Pet Milk Company from 1958 through 1961?

A. No, sir.

Q. Did you have access to the profit and loss statements of the Pet Milk Company?

A. Yes, sir.

Q. Were you afforded an opportunity to inspect all the documents that were in the file in which those P. and L. statements were housed? You visited St. Louis, didn't you?

A. Yes, sir.

• • • • • • •

[fol. 263] Q. And, therefore, if you were going to prepare an exhibit, you would have used the best figures you could get, is that correct, as an accountant?

A. Yes, sir. As a matter of fact, that's exactly what we did in the first exhibit which was prepared. We used the costing information which was extracted from those files.

Q. All right. Now, I direct your attention again to the four columns titled, "Manufacturing Cost Per Dozen." And after that you have a column called, "Weighted Average Manufacturing Cost."

A. Yes, sir.

Q. And that figure is what?

A. That figure has been computed in exactly the same way that the weighted average net sales price has been computed.

Q. And what is it? What's the price—or, what's the cost?

A. By applying the—

Q. Well, how much is it? What's the figure?

A. $3.83.

Q. And your testimony is that you calculated that from the Carnation product mix?

A. Yes, sir. And it exceeds your actual cost of pie by 23 cents.

Q. All right. Where are you reading that 23 cents from?

A. Here's your cost of pie, $3.61. If you wish to round out, $3.83 is the weighted average.

Q. So by using the Carnation product mix, you were successful in increasing the Pet costs by some 23 cents; is that correct?

A. By the same token, Mr. Lamb, the price of the apple pie was also increased by applying exactly the same weighted averages.

Q. But it increased the cost; is that correct? I want you to respond to the question. Did it increase, using the Carnation product mix, did you increase the Pet costs? Yes or no.

A. Of which flavor, Mr. Lamb, because—

[fol. 264] Q. Of apple.

A. It reduced the cost of apple, yes, sir.

Q. It did what? If you—

A. It increased, excuse me, it increased the cost of apple.

Q. It increased it by 23 cents, didn't it?

A. Yes, sir.

Q. Now, Mr. Caldwell, you have another column here called, "Net Sales Less Manufacturing Costs." Now, I assume the way you got that was to subtract this $3.83 weighted average from the $4.97? Is that right?

A. That is correct.

Q. Then we go from there into columns headed, "Spoils," "Freight," "Brokerage and Other Direct Selling," "Total Spoils Freight and Direct Expenses." Under the column, "Spoils," where did you get the two cents?

A. Well, in 1958 I'm reasonably certain that on Pet's own financial statements they indicated four cents. However—and then I think in 1959 it was one cent per case, which would be two cents per dozen. And we've been consistent through the entire period.

Q. In other words, you did not use the actual spoils? You used a fictitious figure? You used two cents, which you developed as Pet Spoils; is that correct? Yes or no.

A. In the early periods, Mr. Lamb, the Spoils on the financial statements indicated four cents per dozen. In the

subsequent year, it indicated two cents per dozen. In the periods after that, Mr. Lamb the unit equivalent per case was left out, generally because your unit equivalents on your financial statements were determined by cases. If it were less than one cent, then it was not reflected on your statement.

• • • • • • •

[fol. 265] By Mr. Lamb:

Q. Mr. Caldwell, you selected that figure, that two cent figure; is that correct?

A. Yes, I did, Mr. Lamb.

Q. Thank you. Now, you have an item for freight, which I understand if you've checked with our accountant?

A. Yes.

Q. And it was found to be accurate. Then you have an item called, "Brokerage and Other Direct Selling."

A. Yes, sir.

Q. Now, where did you get that?

A. From your financial statements, Mr. Lamb.

Q. Then you added all these up. I'm speaking now of, "Spoils," "Freight," "Brokerage and Other Direct Selling." And you got a total called, "Total Spoils, Freight, and Direct Expenses." And how much was that?

A. For which year?

Q. For 1958, January 18, 1958.

A. $1.02.

Q. Then you proceeded to subtract the $1.02 from the $1.14, and you got a 12 cent product? Right?

A. Before other expenses, yes.

Q. Before other expenses. Then you have a column which is called, "Other Selling and G & A Expenses."

A. Yes.

Q. What's that amount?

A. 59 cents.

Q. And then you show net profit or loss per dozen. And how much is that?

A. 47 cents.

The Court: Is it profit or loss?

The Witness: Loss.

Mr. Lamb: Your Honor, I would like to have Pet's Exhibit A-29 for identification and A-30 for identification. Your Honor, I might say here that we have already numbered all of our documents, and this will come in in sequence.

The Court: That's good.

(Defendant Pet's Exhibit No. PA-29 and PA-30 were thereupon marked for identification.)

Mr. Alioto: We have no objection, Mr. Lamb.

The Court: Do you offer them?

Mr. Lamb: Offer them in evidence, yes.

The Court: Received.

[fol. 266] (The Exhibits marked Pet's Exhibits No. PA-29 and PA-30 for identification were received in evidence.)

By Mr. Lamb:

Q. I show you Pet's Exhibit A-29 in evidence, and ask you what that is?

A. That's a product income statement for the Pet-Ritz Foods Division, All Sales Division, December, 1959.

Q. Mr. Caldwell, will you tell me how many cases of frozen pies did Pet sell in 1959?

A. They sold 3,263,689 cases.

Q. Thank you. Now, I show you Defendant Pet's Exhibit A-30 in evidence and ask you what that is.

A. This is a Pet Milk Company sales and earnings year to date, December, 1959.

Q. Now, Mr. Caldwell, with your knowledge as an accountant, will you please tell me whether or not a company who has standard costs which are projected keeps records of variances up and down from those costs as they go throughout the year in their manufacturing operations?

Does a well-run company determine how they stand against those standard costs?

A. I would say that it would be an ideal situation, yes, sir.

Q. Most good companies that have good accounting records do that?

A. I wouldn't say most companies do. I would say it's the ideal situation. Perhaps those standards are only checked against the actual once a year.

Q. Now, Mr. Caldwell, I direct your attention to the third line on Exhibit A-30 in evidence which says, "Production Variances." Do you see that line?

A. Yes, sir.

Q. What's the figure opposite that?

A. $385,989.00.

Q. In other words, as an accountant, do you recognize that $385,000 as a variance from the standard costs? In other words, that Pet's costs for that year, as reflected by that statement, were $385,000 less than they had projected at the beginning of the year?

A. I certainly would not, Mr. Lamb, by virtue of the fact that it also indicates your sales projection was down by $573,356.00.

Q. But the figure that I showed you there is a production variance of $385,000; isn't that correct? A. Yes, sir.

Q. Very well. Now, if you're going to arrive at the actual cost, as distinguished from the standard cost, you would take the number of cases for 1959 and divide them into that $385,000 to get the per case reduction in cost as a result of actual experience, wouldn't you?

A. Would you mind stating that again, please?

[fol. 267] Q. If you were to get Pet's actual cost, you would take the $385,000 savings which appears as a production variance on that sheet, and you would divide that by the total cases sold by Pet to get the per case amount of reduction in cost for that year? Is that correct?

A. No, sir, I cannot follow that theory, Mr. Lamb.

Q. Well, it's just simple arithmetic. Let's try it.

The Court: Well, if it's simple arithmetic, you can argue it to the jury. We don't need to examine the witness about it.

Mr. Lamb: Well, your Honor, it is material—

The Court: If it's just simple arithmetic, I never have the witness do it. I assume counsel can do that.

Mr. Lamb: Well, it comes out to 23 cents per case, and it's very material.

The Court: Well, you've told the jury that, so you don't need to ask the witness that.

By Mr. Lamb:

Q. It comes out to 23 cents a case. So 23 cents a case—I direct your attention now to the weighted average cost which you get at 3.83. If that is the saving that actually took place in 1959, if you were going to properly project this picture, you should subtract that 23 cents, shouldn't you?

A. If that were the actual savings, yes, sir.

Q. You should subtract the 23 cents?

A. That would be true, uh-huh.

Q. Now, Mr. Caldwell, I ought to show you—since these documents in evidence are for 1959, I want to direct your attention to the line dated 12/1/1959.

A. Yes, sir.

Q. Now, in the first line, what is the price of apple which you've listed there?

A. $3.70.

Q. What's the weighted average figure that you have?

A. $3.90.

Q. $3.90 weighted average. Now, will you look at the weighted average in that same line of manufacturing costs and tell me what that is?

A. $3.36.

Q. Now, in 1959 what do you show as the net sales less manufacturing costs?

A. 69 cents.

Q. You didn't give me the right figure, then. It's $3.21 instead of $3.36, isn't it? It makes a little difference. And the difference is what?

A. 69 cents.

[fol. 268] Q. Now, in 1959 we made a calculation that the actual costs of the Pet Milk Company were 23 cents per case lower than the figure that you used? So really what we should do is to add 23 cents to this 69 cents at this point, shouldn't we, to be accurate as an accountant? We add 23 cents? We made up 23 cents?

A. Mr. Lamb, it depends on what you're trying to show. This variance in your production was not known until after 1959, after the sales had been made.

Q. That's correct.

A. After the cost had been made in the normal course of business.

. . . . . .

By Mr. Lamb:

Q. If you have available actual costs and standard costs and the year is over, and you've got all your records, and you want to tell your stockholders how things came out, would you use the standard costs or the actual costs?

A. You'd use the actual costs, if that information were available.

[fol. 269] Q. Now, we do have the actual costs available here, don't we? We have them right here on this document?

A. Mr. Lamb, as far as determining your actual costs from this document, I cannot answer that question.

Q. Now, Mr. Caldwell, you asked us for our profit and loss statements, and there they are. Now, tell me, as an accountant, what it says on those. You don't have to speculate. They're right there in front of you.

A. We asked you for your profit and loss statements, and we also asked you for your costs during the period of this time. The costs that we have used here is the unit costs that were supplied us.

Mr. Lamb: If your Honor please, will you instruct the witness to answer the question?

By Mr. Lamb:

Q. Are the actual costs in front of you on the profit and loss statement for 1959?

A. They certainly are not, Mr. Lamb.

Q. You mean to tell me, Mr. Caldwell, that Exhibit 29 and 30 will not permit you to get the actual costs?

A. From this exhibit here, it indicates, "Cases Sold." It indicates, "Deductions from Sales." Then you have a cost of goods sold figure here, which I'm certain that we certainly would not be able to use in this situation, because first of all, it's not broken down by flavor. Whether or not that variance has been carried over to here—

* * * * * * *

[fol. 270] Q. Mr. Caldwell, you had access to the price lists, off-invoice allowances, advertising allowances, and any other price data that would be necessary for you to ascertain what the prices of the Pet Milk Company were in Salt Lake City?

A. Yes.

Q. You had an opportunity to review invoices of the Pet Milk Company?

A. Yes, sir.

Q. Did you at any time see an IBM run on the invoices of the Pet Milk Company?

A. Yes, sir.

Q. So you are completely familiar with the pricing of Pet Milk in Salt Lake City?

A. I shan't say completely familiar.

Q. Well, as familiar as the data would permit you to be?

A. Yes, sir.

Q. As an accountant with the responsibility you have, you have studied that data very carefully, is that correct?

A. I shan't say "very carefully." It was a limited study, as time would permit. We only recently received the IBM run.

Q. You don't mean to weaken the value of this exhibit, do you, by that?

A. Not at all, sir, not at all.

Q. Very well, Mr. Caldwell, what is the difference between the full truck price and the ex-warehouse price?

A. Well, I think it varies from period to period.

Q. Let's say 1959, the date that we were talking about, December 1, 1959. What was the difference between the full truck price and the ex-warehouse?

A. I can't state offhand.

Q. Would it refresh your memory if I told you it was 28 cents?

A. It wouldn't refresh my memory at all, Mr. Lamb, without having one of the documents before me, one of the price lists.

• • • • • • •

By Mr. Lamb:

Q. We will assume it is 28 cents. Mr. Caldwell, did you make any tabulations as to the number of sales made by the Pet Company in Salt Lake City at the various prices at full truck, at ex-warehouse?

A. No, sir.

[fol. 271] Q. You don't know, as a matter of fact, that we never sold at full truck in Salt Lake City in 1959?

A. No, sir, I do not know that.

Q. But yet you used the full truck price in your study, is that correct?

A. Yes, sir. We used the absolute lowest net price.

Q. In Plaintiff's Exhibit 27 you used the full truck price even though Pet never sold in 1959 at the full truck price, and the ex-warehouse price being 28 cents higher, is that correct?

A. Yes, sir.

Q. Very well. And we have already established that there is a cost variance of 23 cents.

A. No, sir.

Mr. Alioto: Excuse me. I didn't hear the witness' answer.

The Witness: No, sir.

Mr. Alioto: You have not.

The Witness: We have not established that, Mr. Lamb.

• • • • • • •

[fol. 272] By Mr. Lamb:

Q. You do recognize that throughout the period of the year that a well run company, in its accounting department, will determine whether their costs are higher or lower than the projected standard costs that they started out at the beginning of the year with, is that correct? They will take a look at their costs as they go along.

A. That would be the ordinary situation, yes, sir.

Q. And then at the end of the year they will show, in their accounting records, precisely the amount that it was either lower or higher, is that correct?

A. Yes, sir, as nearly as determinable.

Q. Now, I show you Defendant Pet's Exhibit A-30.

A. Yes, sir.

Q. And ask you if there is an item called "Production Variance."

A. Yes, sir.

Q. And how much is that?

A. $385,989.

• • • • • • •

Q. How many cases did we sell?

A: You sold 3,263,689 cases.

Q. How long would it take you to divide that into 385,000?

A. Mr. Lamb, that would not result in the 23 cents reduction. Unfortunately, we do not have—

Q. Answer the question.

Mr. Alioto: Just a minute. I think he should answer it, if your Honor please. Mr. Lamb is interrupting because he knows what the answer is going to be, and his 23 cents is not what he says it is.

[fol. 273] Mr. Lamb: Your Honor, this is a very critical point.

Mr. Alioto: Let him answer the question. You interrupted him, counsel.

The Court: Well, I think counsel is entitled to—when counsel gets through asking him questions, he can say anything he wants to. I think counsel is entitled to develop it by question and answer in the way he wants to develop it. Go ahead.

By Mr. Lamb:

Q. If you divide the three million into the 385,000, what do you get?

A. I will take your word for it that it is 23.

Q. Twenty-three cents, very good. Now, you also say that the difference in the full truck price and the ex-warehouse price is 28 cents, right? A. Yes, sir, from your statement.

Q. Thank you. We will prove it. All right, 28 cents. That is 51 cents, isn't it?

A. Yes, sir.

Q. All right. I want you to take a look at the 1959 calculations that you made by using Carnation's mix, by using the lowest price, by using the lowest cost, rather than using the actual cost, and I want you to say to the Court and to the jury precisely what result you got. Let's take January 16, 1959. How much?

A. You would have 37 cents profit.

Q. Thirty-seven cents profit?

A. Yes.

Q. Error No. 1.

Mr. Alioto: Now, if your Honor please, I make the motion to strike that. If he would give him a chance to explain the 23 cents, it wouldn't be an error.

The Court: I am going to strike that, Mr. Lamb. That is a characterization of the testimony that hasn't anything to do with what the witness has been talking about.

Mr. Lamb: I will withdraw it, your Honor.

By Mr. Lamb:

Q. On 7/8/59 what was the amount?

A. A loss of 44 cents per dozen.

Q. And what would that be if you gave full credit to the correct price and to the savings in cost, if you gave full credit to the 51 cents, that would be a profit of what?

A. Seven cents.

Q. Seven cents.

[fol. 274] Mr. Alioto: I object, if your Honor please, to the characterization that the 23 cents is a savings in cost. There is no evidence on that point at all. And if you will give him a chance to explain it, we will see. It assumes something not in evidence. Savings in cost is something not in evidence in this case.

Mr. Lamb: Your Honor—

The Court: This is Mr. Lamb's theory he is trying to develop. I think he thinks it is, and he is trying to develop that. I do believe that it isn't proved yet. When you say it is a savings in cost, I am assuming that you are stating your theory.

Mr. Lamb: Your Honor, I am taking it from the actual records that are in evidence. It is not a theory at all. Every accountant realizes—

The Court: Well, now, I told you that I thought you were entitled to go ahead and develop your theory of the case, and I required the witness to answer the questions and not to go beyond them, but it seems to me that there is a strong difference of opinion between you and Mr. Alioto about whether your theory is the correct one or whether it isn't.

Now, until you establish it, I don't think you ought to assume something that isn't yet established.

Now, as far as it is in my power to do it—I say this to both of you—I am going to let you develop your own theory.

My notion of a lawsuit is that everybody ought to have his day in court. And you are not going to get your day in court if the judge keeps butting in and interfering with you, so I am trying to stay out of this lawsuit.

• • • • • • •

[fol. 275] Mr. Lamb: If your Honor please, I would like to ask the witness whether or not, as an accountant, he doesn't regard actual cost as a variation from standard cost?

The Witness: Yes, sir.

Mr. Lamb: All right, your Honor, that is all I have said. This question, the previous question that I asked here of the witness: Will you please look at Pet Exhibit A-30, which said, "Production Variances"—I asked him the amount, and he said $385,000. If actual cost is a variation from standard cost, that is it, and you divide that by the number of dozens and you get the answer 23. That is simple arithmetic.

Mr. Alioto: You called it a savings, counsel. That is what I objected to. If you will ask the witness, he will show you how it isn't a savings.

The Court: Well, now, let's let Mr. Lamb go ahead.

Mr. Lamb: This is a tender, tender point, I know.

The Court: Well, it won't be tender if you folks keep working it over this way.

By Mr. Lamb:

Q. Mr. Caldwell, you have already said that if that 51 cents were used, this 13 cent loss would be turned into 37 cents profit, right?

A. Yes, sir.

Q. Very well. And if at 7/8/59 the 51 cents is used, you would convert the 44 cents into 7 cents profit, is that right?

A. Yes, sir.

Q. And then for 9/15, where you show a 28 cent loss, how much profit would there be?

A. Thirteen cents.

Q. Thirteen cents profit. At 12/1, where you show a 55 cent loss, what would it be?

A. Four cent loss.

Q. Now, in your column entitled "Profit or Loss Before All Other Expenses"—

A. Yes, sir.

Q. If you used the 51 cents, wouldn't that wipe out all of the losses in your tabulation?

A. All except one.

Q. Which one is that?

A. The next to the last one, 63 cents.

Q. That is correct, the next to the last one. Out of 12 tabulations, it would knock out all of them but one, is that correct?

[fol. 276] A. Yes, sir, before applying the other selling and general administrative expenses.

Q. Mr. Caldwell, isn't it a fact that this study is purely hypothetical? It isn't based, in other words, on actual sales?

A. It is not based upon actual sales, no, sir.

Q. It is not based on actual costs?

A. It is based on the best costs available.

Q. Mr. Caldwell, didn't you get the actual in the P & L statement that I have showed you, in 1959?

A. No, sir.

Q. You, as an accountant, cannot construct it from those two documents?

A. No, sir.

Q. Isn't it a fact that you used your own selection of spoils, rather than the actual selection of spoils from the P & L statement of the Pet Milk Company?

A. In 1958 the spoils are 2 cents less per dozen than your own statement shows. In 1959 it is exactly the same, and we have been consistent through the entire period of using 2 cents.

Q. But you did not use the actual spoils; you made a selection of the figure for all of the years, is that correct?

A. It would not be more than a penny difference at any time.

Q. But it is different; it is not the actual, is that right? It is a hypothetical spoil?

A. It is not a hypothetical spoil. I think it is very realistic.

Q. But it is not the actual?

A. In the first year it is 2 cents—in the first two instances—

Q. Will you answer my question "yes" or "no." Is it the actual, or not?

A. It is in 1959, it is the actual, yes, sir.

Q. In the other years is it the actual?

A. No, sir. I might add this—

Q. Very well, your answer is "no," is that correct? I just want a yes-or-no answer.

Mr. Alioto: If your Honor please, I object. The witness is entitled to answer the question.

The Court: I think the witness is entitled to explain his answer. Go ahead, Mr. Caldwell.

The Witness: In 1958 and 1959 the Pet Milk Company's accounting records were kept on a divisional basis.

The Court: On a what?

[fol. 277] The Witness: Divisional basis, which set out the Salt Lake Division separately. That is in 1958 and 1959. In 1958 those divisional operating statements indicated a 4 cent loss per dozen. In 1959 those statements indicated a 2 cent loss per dozen. In 1960 the Pet Milk Company went to a product accounting, no divisional accounting. That is true for 1960 and 1961. Therefore, I feel, certainly, that the 2 cent spoils in relation to the total divisions, or the total national area, where much of the product would be sold locally versus being shipped to Salt Lake City—

By Mr. Lamb:

Q. This is your theory? This is your theory; it isn't based on actual records?

A. It is based on 1958 and 1959 for the Salt Lake Division.

Q. This is a statistical study, then, of projections made by you as an accountant, based upon certain hypotheses, is that right?

A. It is based upon the records of the Pet Milk Company.

Q. But it is based on an hypothesis rather than upon the actual, is that correct?

A. No, sir, it is based upon—

The Court: Well, I don't think we ought to characterize it. He has told us what he has done. You want him to say that this is an hypothesis, and that is a characterization. You can call it anything you want. The witness doesn't want to call it that.

By Mr. Lamb:

Q. Mr. Caldwell, did you have a chance to examine all of the profit and loss statements for the years involved in this complaint, of Pet Milk Company?

A. Yes.

Q. It lost money every place, didn't it?

A. Yes, sir, I believe that is true.

Q. Not just in Salt Lake.

A. I believe that is true, yes, sir.

Q. That is a fact, isn't it?

A. To the best of my recollection, they did, they lost money everywhere.

Q. Could an accounting study be made based upon the actual prices that were charged here, upon the actual costs for each year for which there is a P & L statement available, based upon the actual freight, the actual spoils; and if such a study were made, would it resemble the one that you have made here?

A. I think that perhaps the only *different* may be, Mr. Lamb, the absolute net price per dozen, and a study of that sort would contemplate using the actual invoice prices.

Q. In other words, in ex-warehouse it would be 28 cents higher? Right? 28 cents higher?

[fol. 278] A. Yes. Which is the highest price. All of the invoices were ex-warehouse, and it would be at the highest price.

* * * * * * *

[fol. 279] Redirect examination.

By Mr. Alioto:

Q. Mr. Caldwell, I just want to refer your attention again to the exhibit we've just been discussing, which is Plaintiff's Exhibit 27. It is further correct, is it not, that the very first column purports to set out the prices for the Pet Company issued on that day?

A. Yes, sir, on apple pie, yes, sir.

Q. Now, on the day that a company issues a price list, any kind of a company, does it have the actual costs of the sales that are to be made in the future against that price list?

A. No, sir.

Q. Therefore, actual costs in connection with that price list don't have any bearing on what the company had in mind on this day, do they?

A. No, sir.

Q. All right. Now then, Mr. Lamb has been characterizing or talking about 23 cent saving that he's put up on this board, and he characterizes it as a saving, and he gets his [fol. 280] characterization from a document entitled, "Pet-Ritz Foods Division, Sales and Earnings for the Year to Date, December of 1959."

A. Yes, sir.

Q. All right. Now, it's perfectly clear, is it not, Mr. Caldwell, that December of '59 was a period after the issuance of the price list?

Mr. Lamb: Your Honor, I object to counsel leading his own witness.

Mr. Alioto: All right.

The Court: Yes, I think you ought not to lead your witness. It's a very handy way, I know, to proceed.

By Mr. Alioto:

Q. Would you be good enough, Mr. Caldwell, to take a look at this document handed to you by Mr. Lamb, and then take a look at your own study for all of the 1959 price lists, and state whether that document handed you by Mr. Lamb was even prepared prior to the issuance of those price lists?

A. No, sir.

Q. Was it prepared after the issuance of those price lists?

A. Yes, sir, it would have to be.

Q. Therefore, anybody who has a price list or were preparing the price lists wouldn't have had this document before him, would he?

A. No, sir.

Q. Now, with respect to that 23 cent saving, is there anything on the document I've just handed you dated December, 1959, the sales and earnings of the Pet-Ritz Milk Company, which justifies the assertion that it proves a 23 cent saving?

A. No, sir.

Q. Would you be good enough to explain that answer?

A. First of all, in 1959 there was divisional accounting. In other words, there were accounting documents for the Salt Lake area. This covers all areas and all production plants of the company. Secondly, it indicates a reduction from budget in sales of $251,720, which essentially would mean that certainly the greater portion of the production variance would simply mean that they didn't sell as many pies as they originally budgeted at the beginning of the year and would have very little or no relationship to the

standard costs except for adjusting in the succeeding period for any actual expense variance versus volume variance.

Q. Do you know any principle of accounting in the light of that explanation which could justify anybody in saying that that document reflects a 23 cent saving?

A. No, sir.

Q. Now then, Mr. Lamb has some objection about a product mix. He said that you took the Carnation product mix instead of the Pet product mix. Did you have the Pet product mix at the time you prepared this study?

A. No, sir, not for the Salt Lake area.

[fol. 281] Q. Do you have it now?

A. Yes, sir.

Mr. Alioto: I'll offer into evidence at this time, if your Honor please, a document which the defendants have handed me and asked me to authenticate, and I assume, therefore, they have no objection to its offer in evidence, showing a product mix, a composite product mix, of all of the defendants for the Salt Lake area, including Pet. It's the product mix from Dr. Anderson's study that was handed to me by you three folks for authentication.

Mr. Schafer: We do certainly object, on behalf of Continental, your Honor, if this is supposed to show the product mix of the Continental Baking Company in the Salt Lake City market in any year involved in the proceeding. There is a way of getting the product mix, and this isn't it, and they have available a way to do it. So this is not proof of Continental's product mix in the Salt Lake market.

Mr. Billings: Same objection.

Mr. Lamb: Same objection.

Mr. Alioto: If your Honor please, it's a product mix that is different than the one used by Carnation, and yet it's for the Salt Lake City area. It's a—

The Court: Whose product mix is it?

Mr. Alioto: All three of them.

Mr. Schafer: No, the entire market.

Mr. Alioto: For the entire market. It's a produce meant for the entire Salt Lake City market.

Mr. Schafer: Every seller. Fifteen or twenty companies, your Honor. Not the three or four. The Utah Pie Company's in here, everybody, twenty companies. I can prove with mathematical certainty what the Continental product mix is, and they can do it, too, with the documents they've got in their own hands.

The Court: I'll give you an opportunity to do it.

[fol. 282] Mr. Schafer: Yes, and I'm going to do it. But this doesn't do the job.

Mr. Alioto: Well, let's reserve this, if your Honor please, if there's any question about it. Do you have the product mix for the Pet Milk Company here available?

Mr. Lamb: We don't have it available here.

By Mr. Alioto:

Q. Do you have it available, Mr. Caldwell?

A. For the Carnation Company?

Q. Not the Carnation Company. The Pet Milk Company.

A. No, I do not have it.

Q. Have you ever had it?

A. No.

Q. That's what I didn't understand in your prior question. I probably said Carnation. In other words, you have never had the Pet product mix?

A. No, sir.

Q. Okay. Now then, just one last thing on the mathematics and these other questions of Mr. Lamb. If it is true that the document handed you by Mr. Lamb has no justification on it for what he calls a 23 cent saving, then it is a fact, is it not, that all of the calculations on the page, even with the 28 cent saving—that is, all but three of the calculations—would still show a loss?

A. That's correct, yes, sir.

Q. And now, your prior study is simply on the basis of the lowest possible price that any buyer in the Salt Lake City area could have—on which any buyer could have bought the pie; is that correct?

A. Yes, sir.

Q. And it doesn't purport to be anything else?

A. No, sir.

Q. Now, the other studies we've actually put in evidence show the actual profits and losses of the company for each of the years in question?

A. Yes, sir.

Mr. Alioto: We have no further questions.

The Witness: I wish to clarify one question. I did have Pet's product mix since receiving the I.B.M. run, which has been recently, and since this was originally prepared.

Q. But that was received after this study was worked out by you?

A. Yes.

[fol. 283] Recross examination.

By Mr. Lamb:

Q. I do understand that you're changing your testimony to that, that you could have calculated our product mix, you could have used the Pet product mix when you made up this exhibit; is that correct?

A. Not when I made up the exhibit, Mr. Lamb. I could have corrected it had time permitted. I think it would have had very little effect on it. I don't think the product mix is very important, because essentially—

Mr. Lamb: I object to this, because the witness should answer the question.

The Court: Yes, I think so.

Mr. Lamb: The data was available and in the hands of the witness, and he could have made a calculation based on Pet's actual sales, rather than using a competitor. Now, are you finished, Mr. Alioto?

Mr. Alioto: Yes, I'm finished. You are asking questions at the moment.

By Mr. Lamb:

Q. On redirect, Mr. Caldwell, Mr. Alioto asked you if the actual costs didn't happen after the dates of these effective prices; and you answered yes. Now, as an accountant, when you're making a study of profit or loss and you have available to you the actual costs, do you use something other than the truth to determine profit or loss?

Mr. Alioto: If your Honor please, I submit the question is argumentative; but more than that, it assumes something not in evidence; namely, that this is a study of profit and loss. This isn't anything more. As the witness has said two or three times now, and Mr. Lamb has apparently heard him, then a study of what a salesman had in mind when he made up a loss and does not prove what the actual losses and profits are, because we have those in evidence otherwise; so they aren't being hit. So the characterization of this study as a profit and loss study is not a correct characterization. I think counsel knows that.

Mr. Lamb: I don't understand why I'm argumentative and Mr. Alioto isn't.

[fol. 284] The Court: I think you both are. Now, I do think you improperly characterized what this is, this document is.

Mr. Lamb: May I ask the witness a question, then?

By Mr. Lamb:

Q. What is it?

A. Mr. Lamb, the best way to answer that perhaps is to refer to documents that the Pet Milk Company make up themselves, refer to as margin studies. There were many of them in the files. It starts out with a sales price at which the product is—has been offered or will be offered, or they project to offer. Then from there, they base the cost of sales upon the standard costs at one of the plants at that particular time. They come down to a gross profit factor. Then they use the other selling and the general

administrative expenses based upon the best available estimate as to—in relation to the actual costs that have been incurred in the past. Very often on your margin studies it will leave off, say, details, or perhaps advertising. To a certain degree, this is the same type study, only more realistic, because we are dealing with the actual standards which you use in your custom—

Mr. Lamb: Your Honor, I object to this characterization.

The Court: Well, the objection is overruled. Go ahead, Mr. Witness.

The Witness: This is—

The Court: The witness is explaining his answer which you asked him to get. Go ahead.

The Witness: This study is more realistic from the standpoint that we're using the actual standards as developed by the company. We're using the actual costs from that point on incurred by the company.

By Mr. Lamb:

Q. Very well, you as an accountant know, and understand that at the end of each year, there are records of actual performance. Is that not so?

A. Yes, sir.

Q. And the best study could be based on the actual records, rather than on hypothetical records, isn't that so?

A. I'm certain from the standpoint—

Q. Answer the question yes or no.

A. Yes, sir.

[fol. 285] Cross examination.

By Mr. Billings:

Q. Mr. Caldwell, I'm going to question you with respect to Exhibits 22, 28, and 29. Do you have those available, sir?

A. I don't have them numbered, Mr. Billings. If you would refer to the title of the document.

Q. Well, here are the actual documents. Why don't you hold those, and I have my copy here at the table. Perhaps we can proceed a little better if I sit here with my documents, and you with yours, if it's agreeable with you, Mr. Caldwell. Would you turn to Exhibit 22 which you have captioned Carnation Company's Summary of Territorial Profit and Loss, Frozen Foods Division, a two-page document.

A. Yes, sir.

Q. And then, yesterday we attached to it three sheets, being the Territorial Profit and Loss Statements of the Carnation Company, from which I understand you said you derived the figure shown on this exhibit; is that correct, sir?

A. Yes, sir.

Q. All right. Let's look at the sheet, say, for 1960 on, if you would, please, the supporting sheet, the Territorial Profit and Loss. Now, up in the upper right-hand corner it has a breakdown by each territory, with a number of cases, does it not?

A. Yes, sir.

Q. And the total shown in the upper right-hand corner for each territory is the figure which you have put on your exhibit. Is that not correct, sir?

A. Yes, sir.

Q. Now, southern California, for example, which is the first one in line, shows 410,395 cases of 8-inch pies, 99,570 cases of 9-inch pies, 89,574 cases of creams, 13,495 other; and a total of 613,000 altogether.

A. Yes, sir.

Q. And that's a figure you inserted in the first line of Exhibit 22 with respect to southern California; is that not right, sir?

A. That's a figure that appears there. We did not insert it on this.

Q. Well, it's the same figure?

A. Yes, yes, sir, it's the same.

Q. I'm not going to argue the words with you.

The Court: Well, use the right ones, then, because you invite an argument.

Mr. Billings: I didn't know there was anything wrong with "inserted."

The Court: Well, it gives an implication it was put in after the thing was prepared.

[fol. 286] Mr. Billings: I had no such inference at all.

The Court: What you mean, he used that.

Mr. Billings: Used that figure, yes.

By Mr. Billings:

Q. And then for northern California, which is the next column on this sheet, it has the same breakdown of 8-inch, 9-inch, creams, and other, does it not?

A. Yes, sir.

Q. And it shows, does it not, of the 554,000 total cases, that some 290,771 cases were 9-inch pies, does it not?

A. Yes, sir.

Q. And then we have a similar breakdown for each region, showing the number of 8-inch, 9-inch, creams, and others. Is that correct?

A. Yes, sir.

Q. So that the figures on your exhibit are a composite of sales of 8-inch, 9-inch, creams and other pies; is that not right, sir?

A. Yes, sir.

Q. And does not this sheet for 1961 show that the Pacific Northwest area has some 85 per cent of the number of cases, 8-inch pies?

A. Yes, sir.

Q. While northern California shows only 26 per cent 8-inch pies?

The Court: What are you getting at, Mr. Billings?

Mr. Billings: I'm getting at, your Honor—

The Court: I don't follow you. I don't know what you're getting at.

Mr. Billings: Well, these figures are a composite of 8-inch, 9-inch, creams, as the witness has stated. And, of course, the plaintiff here is only talking about 8-inch pies; and I want to show that with respect to these figures, that these figures take in sales of both types of pies and that in the areas where this record shows, the areas where the larger percentage is 9-inch pies, such as the northern California area, that is the only area in which Carnation Company made a profit, and in every other area in the United States we lost money. That's all I want to show.

[fol. 287] The Court: All right. Go ahead.

By Mr. Billings:

Q. Now, you did not include on your—

The Court: Does that exhibit show that?

Mr. Billings: The sheet he has in his hand shows that, yes, your Honor, which is a part of that exhibit.

Mr. Alioto: At Mr. Billings' request, I put it into evidence, so it's in evidence, showing exactly what he wants to show.

The Court: If all you're asking the witness to do is tell you that the exhibit shows these figures, why, that's wholly unnecessary. It's already in evidence.

Mr. Billings: Well, this is the source material—

The Court: You can argue it to the jury if it's in evidence, when the time for argument comes; but I don't see any sense now in having the witness read the exhibit to us.

Mr. Billings: I'm not going to go through the whole exhibit, your Honor.

The Court: Well I think maybe we've reached the end of it now.

Mr. Billings: All right, sir.

The Court: If that exhibit shows these figures, and that's all you're asking about, it would seem to me that it's merely having the witness read the exhibit to us.

Mr. Billings: All right. I'll stop that line.

The Court: All right.

By Mr. Billings:

Q. Mr. Caldwell, in connection with Pacific Northwest States, which is the area encompassing the State of Utah and, as you've testified yesterday on voir dire, also, Washington, Oregon, Idaho, and Montana, did you have available to you the number of case sales made out of the Salt Lake City area or Utah trade area by the Carnation Company?

[fol. 288] A. If we did, Mr. Billings, I can't think exactly where it would be in the Salt Lake area. The Salt Lake area has been used in a lot of connotations. Sometimes this includes Idaho, sometimes Montana, and someplace other areas. I—

Q. I'll put it a different way. Were you shown by the attorneys for the plaintiff the copies of the total sales out of the Salt Lake City office of the Carnation company for 1959, 1960, and 1961, the three years encompassed in this exhibit, which we furnished to them?

A. In Salt Lake City?

Q. Yes, out of the Salt Lake District Office.

A. Perhaps I have, Mr. Billings. I don't have a specific recollection of which document it might be or—

Q. Well, if I told you that that document shows that in 1961, for example, the Carnation Company sold of the type of pies which the plaintiff here sells, that is, apple, cherry, boysenberry, and peach—

The Court: My goodness, we've heard enough all week on this. Everybody knows. All three of these people are selling the same kind of business.

Mr. Billings: We're also selling other pies, your Honor.

The Court: Well, we're not interested in the other pies. That's outside the scope of this lawsuit.

Mr. Billings: The point I want to make is that these figures, your Honor, contain a lot of other pies.

The Court: You're asking the wrong fellow, then, I suppose.

Mr. Billings: Well, it has to do with this exhibit which he prepared, your Honor.

The Court: Well, does the exhibit show that they sell a lot of other pies?

Mr. Billings: No, that's what I want to point out, that it doesn't show that.

The Court: Well, the exhibit shows and shows not whatever it shows. So why isn't that the evidence of the situation?

Mr. Billings: Your Honor, I ought to make clear what this exhibit shows and what it doesn't show.

[fol. 289] The Court: Well, the exhibit is the best evidence of that You don't have to examine the witness on that subject at all.

Mr. Billings: Yes, sir.

By Mr. Billings:

Q. Mr. Caldwell, in preparing these exhibits, was there made available to you a price list of the Carnation Company?

A. Yes, sir.

Q. And did you notice in those price lists that there is a difference in price between 8-inch and 9-inch pies of roughly $2.00 a dozen, no matter what area you're talking about?

A. I couldn't verify the price at all, and I would have no knowledge of the variance in price between the two.

Q. Well, you made Exhibit 28, which is a price study, did you not?

A. Yes, sir.

Q. Didn't you look at those price lists for that purpose?

A. I may have glanced at it, but I was looking for 8-inches. I made no study as far as the prices of the 9-inch or the deals or anything in relation to the 9-inch.

Q. Do you have a Carnation price list?

The Court: Well, now, what's in evidence about this? What's this evidence?

Mr. Billings: I wanted to ask him a question, your Honor, with respect to this exhibit.

The Court: Go ahead and ask him.

Mr. Billings: But I'm—well, I'm trying to get the groundwork for that, your Honor, by referring to the difference in prices between 8-inch and 9-inch pies.

The Court: Let's assume there is a difference.

By Mr. Billings:

Q. Well, yes, let's assume there is a difference of roughly $2.00, then, Mr. Caldwell, a difference in price between 8-inch fruit pies and 9-inch fruit pies. Will you agree with that with me?

A. Yes.

Q. Assume that. Then, the price per dozen that you have on the second sheet of Exhibit 22 would be affected, would it not, by the fact that this is a composite price per dozen of 8-inch and 9-inch pies?

A. Yes, it would be affected.

[fol. 290] Q. So that the higher the percentage of 9-inch pies in a particular area, as shown on this exhibit, then the higher the average price per dozen?

A. Based on that assumption, that would be true.

Mr. Billings: Thank you.

The Court: Any further cross-examination of this witness?

Mr. Billings: Yes, I'm not through, your Honor. I've only gone through one exhibit, if I may.

The Court: Well, go ahead.

Mr. Billings: I'm trying to as rapidly as I can.

By Mr. Billings:

Q. Now, Exhibit 26, Mr. Caldwell, the figures on that exhibit are taken from the, as I understood your testimony, are taken from the same territorial profit and loss state-

ments which were furnished to you and which are attached now to Exhibit 22, am I right?

A. Mr. Billings, I don't have 26 here. Which schedule is it? I have 27, 22, 28, and 29.

Q. I'm sorry. I thought I gave you 26.

In other words, this is taken from the same source material as is Exhibit 22?

A. Yes, sir.

Q. And it is also, therefore, a composite of the prices, profits and losses, on both 8-inch and 9-inch pies and creams?

A. Yes, sir.

Q. Now, turn, if you would, Mr. Caldwell, to your Exhibit 28 and, if you remember, yesterday I asked you some questions about the Carnation Company platform costs which you had used in preparing a portion of this exhibit.

A. Yes, sir.

Q. Do you have a copy of those available before you?

A. No, sir, I do not.

Mr. Billings: I have one. Would you mark this?

The Clerk: What exhibit?

Mr. Billings: Carnation's Exhibit 1, I guess.

(Defendant Carnation's Exhibit A was thereupon marked for identification.)

[fol. 291] By Mr. Billings:

Q. I show you, Mr. Caldwell, a document which has been marked Defendant's Exhibit C-A and ask you if that is a copy of the document which you used in preparing a portion of this exhibit?

A. Yes, sir.

Mr. Billings: I offer that in evidence.

Mr. Alioto: We have no objection.

Mr. Billings: I will leave this with you. I have a copy, and we can follow it.

The Court: Received.

(The document marked Defendant Carnation's Exhibit A for identification was received in evidence.)

By Mr. Billings:

Q. Now, Mr. Caldwell, as I understand this exhibit, this is one for the Carnation Company similar to the one for the Pet Milk Company which Mr. Lamb interrogated you about shortly before, is that correct?

A. Yes, sir.

Q. And it is the one you said was characterized, as I understand it—my notes show—to show what, in this case, I assume, what a Carnation salesman would have in mind when he was selling a pie—or what was the phrase you used?

The Court: He didn't use that phrase.

Mr. Billings: He didn't use the word "Carnation." He was talking about the other exhibit.

The Court: He didn't use this business of "having in mind."

Mr. Billings: That is what my notes show.

Mr. Alioto: You took my statement, Mr. Billings.

The Court: You took that from Mr. Alioto.

By Mr. Billings:

Q. What is this exhibit designed to show? We will start out with that.

A. The exhibit is designed to show the absolute net price that a customer could have acquired pies from Carnation Company on these specific dates, and applying the best available cost information which was furnished us by the defendants and applying the equivalent dozen cost for other categories of expenses.

[fol. 292] Q. I see.

A. And indicating a net profit or loss per dozen based upon those facts.

Q. So that it is a theoretical exhibit, theoretical sale and theoretical cost, is that correct, sir?

A. No, sir. The only thing that is theoretical, perhaps you could put in the area of theory is the absolute net price.

Q. Let's start with that, then. As I understand it, you have taken the full truck price.

A. Yes, sir, the lowest possible price that a customer could have acquired pies.

Q. Did you ever make any examination of the invoices of the Carnation Company, or the other records of the Carnation Company which were made available to you to determine whether or not we ever made any sales in the Salt Lake area in the full truck category?

A. No, sir.

Q. Do you know whether or not we made any?

A. No, sir.

Q. So that, as a matter of fact, this could have no relation at all to the actual sales that the Carnation Company made on or about the dates indicated on this exhibit?

The Court: Well, do you draw that "therefore" from the fact that he doesn't know?

Mr. Billings: Yes. He doesn't know whether we made any at full truck price, which is the figure that he has used; therefore this does not necessarily show what the actual sales price was on the particular date for the Carnation Company.

The Witness: It does not show what an actual sale was made at.

Mr. Billings: That is right.

The Witness: It shows what a sale could have been made at, the lowest price that a sale could have been made.

By Mr. Billings:

Q. The lowest price?

A. Yes, sir.

Q. But you don't have anything on this exhibit—or you have no knowledge, either—of whether or not we actually sold at that price?

A. No, sir.

Q. Is that correct? Now, on your column—before I get to that, these net price per dozen, this lowest possible price at the full truck category, I take it you have included in preparing these—whatever special allowance was in effect at the time, is that correct, sir?

A. Yes, sir.

[fol. 293] Q. Off the face, advertising allowance, and the like, is that correct?

A. Yes, sir.

Q. Now, this weighted average which you have used, weighted average net sales price, I take it, you have taken from the Carnation product mix, is that right?

A. Yes, sir.

Q. Which was furnished you?

A. Yes, sir.

Q. The sheet which is attached?

A. Yes, sir.

Q. That is a yearly average, is it not, Mr. Caldwell, so labeled?

A. Yes. I am reasonably certain that would be true. It was furnished by Mr. Bye.

Q. So that, for example—

The Court: Mr. Bye is who?

The Witness: The accountant for Carnation Company.

By Mr. Billings:

Q. The gentleman sitting right beside me?

A. Yes, sir.

Q. For example, on this exhibit you have seven different dates in 1960, four different dates in 1961, two in '59 and one in '58, if I read this right.

Now, if this is a yearly average, the theoretical sale which would have been made on any one of those seven days in 1960, or those four dates in 1961, for example, would not necessarily have been in the same proportion as the yearly average, would they?

A. No, they would not, Mr. Billings, but, however, I think in many instances it would make absolutely no difference, because the price on all of the flavors were exactly the same, and the weighted average would come out with exactly the same price.

Q. Where it is the same. Where it is different, it would make a difference, would it not?

A. Yes.

The Court: The witness says in all cases they are the same.

The Witness: No.

Mr. Billings: I think that is contradicted by his very exhibit, your Honor.

The Witness: I say in most of the instances I would say that they are the same. On the last one, two, three, four, five, six, seven, eight, nine, on nine different dates they are exactly the same price.

[fol. 294] By Mr. Billings:

Q. Mr. Caldwell, in that connection, when I called to your attention this morning before the court that there were some errors, at least as far as our records showed, on the actual prices you had on this exhibit from what our records showed, did you take an opportunity to check those figures?

A. No, sir. I didn't receive any figures from you, Mr. Billings. The figures we have used here were taken from the net price study which was furnished to you early in January, and we assumed, of course, that they were correct, inasmuch as we had received no word that there was any error. Our study was based upon an actual examination of the price lists and of the—

Q. I understand that. I said you furnished this yesterday, I furnished you this morning some examples of where there were different figures, is that not correct?

A. You indicated that there were some differences, Mr. Billings.

Q. Yes. Now, the next column you have your manufacturing costs per dozen, and the source of that is the document which we have had admitted in evidence as Carnation's Exhibit C-A, is that not right, Mr. Caldwell?

A. Yes, sir.

Q. Now that, as I see it, is made up of categories—the actual ingredients of the pie, and they come to a subtotal shown on here, "Prime Cost," right?

A. Yes, sir.

Q. And then the next item is "Processing, Direct Labor," is that correct?

A. Yes, sir.

Q. And then the next two items—the next item is "Indirect Labor"?

A. Yes, sir.

Q. The direct labor would vary, would it not, in direct relation with each pie produced?

A. It may or not not, Mr. Billings. It may be exactly the same on the production line.

Q. What I meant is that that is tied in directly, like an ingredient; it is a cost you have only if you make pies, is that correct, the direct labor?

A. Within reason, Mr. Billings. The assumption is that if you are not going to make any pies over a prolonged period, you would lay the help off.

Q. That's right.

A. And you wouldn't have any labor.

Q. So you would only have that expense if you made the pie. Now, indirect labor is, in accounting terminology, one you would have whether you made pies or not?

A. That may or may not be true.

Q. When wouldn't it be true?

A. When you are not making pies, you may reduce the indirect labor.

Q. Other than that it is labor you would have around the plant, the *forman*, the fellow who sweeps out the place, and all that type of labor?

[fol. 295] The Court: What has that got to do with this lawsuit?

Mr. Billings: Your Honor, I am trying to establish what the figures are on this cost. It seems to me I am entitled to develop, as best I can, the figures he has used and how he has done them.

The Court: Well, you got them from the defendant, didn't you?

The Witness: Yes, sir.

The Court: And you are the defendant.

Mr. Billings: Yes.

The Court: Representing Carnation.

Mr. Billings: Yes.

The Court: They are your figures.

Mr. Billings: I am not quarreling with the figures, at all.

By Mr. Billings:

Q. The next figure, "Overhead," that is also another expense you would have, would you not, Mr. Caldwell, whether or not you made any pies?

A. That may or may not be true, again, Mr. Billings.

Q. Again. Certainly you would have depreciation on the buildings?

A. It depends on whether it is a fixed expense or a variable expense.

Q. Right. And overhead is an item normally of fixed expense, is it not?

A. There may be some variable items.

Q. There may be some, but the major part are fixed, are they not?

A. That would be the normal assumption.

The Court: I still don't know what you are trying to do.

Mr. Billings: I can only ask him one question at a time, your Honor.

The Court: That's right, but you have asked him a couple of dozen questions that don't seem to be leading anywhere.

Mr. Billings: Now I hope to get to what I have been leading up to.

[fol. 296] By Mr. Billings:

Q. I call your attention, Mr. Caldwell, say, to the year 1960. This would show, would it not, that the Carnation Company's costs, according to this sheet, for indirect labor and overhead were about 70 cents a dozen?

A. Which sheet—are you looking at the platform cost sheet?

Q. Yes, sir.

A. In what period of time?

Q. Let's take 1960.

A. Which period of time?

Q. Either one. They are the same, are they not? You take 16 cents and 19 cents, comes to 35 cents, and this is per case?

A. Yes, sir.

Q. So that would be 70 cents per dozen, would it not?

A. Yes, sir.

Q. So on these figures you have shown on Exhibit 28, your manufacturing costs per dozen, and this weighted average manufacturing cost, 70 cents of that, more or less, depending on which ones are variable and which are not, would be an expense Carnation would have whether or not it made any pies?

A. That may or may not be true.

Q. Depending on how many of them are variable?

A. That's true.

Q. You said that most of the overhead items were fixed?

A. That would be the normal situation.

Q. And most of your direct labor would be fixed?

A. Yes, sir.

Q. Now, calling your attention to the item for spoilage on Exhibit 28, was the source of that information the same three sheets which we have attached to Exhibit 22, that is, our territorial profit and loss?

A. I think in one year, Mr. Billings, you indicated that your spoils was actually 2 cents. From that point on it went down again. The fact that Carnation Company has no finer accounting divisionwise, other than the Pacific Northwest-Mountain States, we have assumed that whatever spoilage there was, the greater portion of it would certainly pertain to shipments into Salt Lake City. We are only using 2 cents per dozen.

Q. I understand.

A. It is possible that it could have been one cent per dozen, but there is absolutely no way, without adding up all of the credits that went back to the customers, in determining exactly what that would be for the Salt Lake area. We have found that the nearest thing we can pinpoint is the fact that Pet Milk Company experienced, in 1958, something more than that; in 1959 they experienced less than that. And that is the only division accounting confined to the Salt Lake area which we have.

Q. So that you used for Carnation Company the 2 cents that Pet had?

A. No.

[fol. 297] Q. I thought that is what you said.

The Court: That isn't what he said at all.

A. Carnation indicated in one of the years that they also had 2 cents.

By Mr. Billings:

Q. As a matter of fact, on this sheet for December—for the year 1961, under the item of "Spoilage" for the Pacific Northwest States, it shows no spoilage allocated, does it not?

A. Well—

Q. Look at the exhibit, if you will, please.

A. This is for what year?

Q. 1961.

A. In 1961 you indicate for the Pacific Northwest-Mountain States that you had $2,827.80 in spoils.

Q. That is correct. And then if you noted down here on the "Per Case," it shows nothing.

A. That's correct.

Q. And it shows that of the total number of cases for that year there were 349,000, and I think we just agreed that in Utah there were some 30,000, or less than 10 per cent of the total. Is that not correct?

The Court: You are reading the exhibit to him?

Mr. Billings: Yes.

The Court: Well, stop it, because the exhibit is in evidence and I don't have witnesses read exhibits.

By Mr. Billings:

Q. Now, Mr. Caldwell, the next column, "Brokerage and Other Direct Selling," on this exhibit—

A. Yes.

Q. (Continuing) —what items are in "And Other Direct Selling"?

A. Well, essentially you would have your warehousing expense, your brokerage expense, your advertising, other than your co-op; you would have your salesmen's salaries, sales travel. That would be the major portion of it, Mr. Billings.

Q. Now, if you have warehousing in that total, why did you use the full truck price over here where there is no warehousing involved?

A. The freight figures, Mr. Billings—

Q. I didn't say anything about freight. I was talking about the net price per dozen.

The Court: Let him answer the question.

[fol. 298] A. I don't understand, Mr. Billings.

By Mr. Billings:

Q. I will put the question again. You have used as the price from which you are deducting this expense of warehousing—you are using a full truck price, for which there would be no warehousing involved, and I am asking you why?

A. I can't quite see the relationship between full truck price and warehousing. I think it would still be possible to ship in full truck and put it in a warehouse.

Q. Well, there is a warehouse price, an ex-warehouse price, that is 28 cents a dozen higher than the full truck price that you used.

A. That is a price list, but—

Q. Yes, sir.

A. (Continuing) —I still don't think there would be any indication whether or not a full truck went into a warehouse.

Q. A full truck price is a price where a buyer gets it in one full truckload direct from our plant in Torrance, to the buyer's plant, is it not?

A. Well, it, of course, would still be possible, I am sure, to ship from California into a warehouse in Salt Lake and have it sold later. I am not a pie expert. I don't know how Carnation runs their business, but I can't quite see the relationship.

Q. Maybe that is why we are losing money.

The Court: Well, now, let's not—

Mr. Alioto: Your Honor, I object to this. The reason I am going to object to this is that he had an expert witness this morning say that he warehoused his pies from Watsonville right in California. I don't know what all these laughing boys are clowning around about. We had an expert tell us that this morning.

Mr. Schafer: That has absolutely nothing to do with this.

Mr. Alioto: That is exactly what we were discussing.

The Court: All right, let's not have any argument on it. Don't you argue with the witness.

Mr. Billings: I didn't think I was.

The Court: I thought you were.

By Mr. Billings:

Q. Now, travel is included in that item, is that right, Mr. Caldwell?

A. Salesmen's travel.

[fol. 299] Q. Yes. And this figure is taken from the Pacific Northwest territory, which includes Seattle and Portland, Spokane and Boise, and other cities in that area, is that right?

A. Yes, sir.

Q. So this would include the cost of salesmen in that area, too, would it not?

A. It would be averaged out per case sold, wherever sold.

Q. The efforts of salesmen in selling 90 per cent of the pies as opposed to the 10 per cent of the pies in that area which came from Salt Lake?

A. I would assume it would still be a pro rata unit equivalent dozen basis.

Q. What do you mean by that?

A. I mean that if 10 pies were sold down here and 50 up in the Northwest and that the total travel expense was $10, that only one-fifth of that $10 would be allocated to the 10 pies sold down here.

Q. But that is just what you didn't do, isn't it?

A. Oh, yes, we did.

Q. You allocated the whole 10 pies in the whole Northwest to the one pie in Salt Lake, have you not, on these figures?

A. No, sir. We have taken the total pies sold everywhere in this division.

Q. Yes.

A. And divided those into the total expenses, which would bring it down to a dozen basis.

Q. This figure for warehousing and travel and advertising is an average figure for the whole territory, is it not?

A. Per dozen, yes, sir.

Q. Yes, per dozen. And that is based on the cost of selling 10 pies where only one was sold in Salt Lake isn't that right?

The Court: I don't understand the question.

By Mr. Billings:

Q. Do you understand the question?

A. No, sir, I do not. It is on a per-dozen basis, irrespective of where it is sold. We took the total number of pies in the Pacific Northwest-Mountain States and divided that into the expenses of the Pacific Northwest-Mountain States.

Q. Supposed to sell these 10 cases of pies it cost, on this particular item, $10, right?

A. Yes.

Q. So it cost $10 for the whole territory to sell those 10 pies. Now, we only sold one of those in Utah, right?

A. So there would be $1 allocated, and nine against the other nine.

Q. So you would only allow $1 out of that?

A. Yes, sir.

[fol. 300] Q. And also assuming we had that expense here, right?

A. Yes, sir.

Q. Now, this next to last column, "Other Selling and G & A Expenses," those items are what, Mr. Caldwell?

A. They are the per dozen figures taken from the Carnation Company's statements.

Q. But what do they include? What are G & A Expenses?

A. It would include so-called allocated selling expenses and also allocated general and administrative expenses, which I assume—

Q. They are the type—

A. Which I assume are—this is just an assumption—that they are over-all corporate expenses which have been allocated to this particular operating division.

Q. The type of expenses that we would have whether we sold pies or not in Salt Lake City?

A. May or may not be. I'm not qualified to answer that.

* * * * * * *

Cross examination.

By Mr. Schafer:

Q. Do you have copies, Mr. Caldwell, of Plaintiff's Exhibits 23 and 29?

A. Yes, sir.

Q. I take it that from your testimony so far you are satisfied that those two exhibits are put together under good accounting principles?

A. Yes, sir.

Q. And you've identified to Mr. Lamb that good accounting principles are principles developed over the years?

A. Yes, sir.

Q. Now, getting at this question of product mix, Mr. Caldwell, what is product mix?

A. Product mix means the quantity of a given—the ratio of the various flavors that would be normally sold.

Q. It's a concept of the makeup of the sales, isn't it?

A. Yes, sir.

• • • • • • •

[fol. 301] By Mr. Schafer:

Q. Now, Mr. Witness, you contradict me if I'm wrong, but let's take the four fruit flavors that we're dealing with here, apple, peach, cherry, and boysenberry. Let's draw a round circle, and we'll call that a pie.

A. Yes, sir.

Q. Now, your product mix is made up of those four flavors, and they make up that pie?

A. Yes, sir.

Q. And to determine the makeup of the mix, you figure out the percentage of that total accounted for by the one flavor; say, apple. Right?

A. Yes, sir.

• • • • • • •

The Witness: In 1958, for example, in the Salt Lake area, if there were just 100 pies sold, 50 of those pies

would have been apple, 29 would have been cherry, 18 boysenberry, and 2 peach.

* * * * * * *

By Mr. Schafer:

Q. That, then, is what you mean by "product mix"?

A. Yes, sir.

[fol. 302] Q. And when you say that apple pie accounts for a certain percentage of the product mix, what you mean is a certain percentage of the product sold in the market; right?

A. Yes, sir.

Q. I take it that the best way to figure out what the product mix was would be to look at the invoices of sales; is that right?

A. It could be determined from the invoices, yes, sir.

Q. I asked you whether or not that wasn't the best way.

A. That would be the best way, yes, sir.

Q. All right. Are you aware that your attorneys have had all of the Morton invoices since about June or July of this last year, 1962?

A. Yes, sir. On microfilm.

Q. You didn't ask for those invoices in order to determine what the real product mix of Morton was?

The Court: Well, he didn't ask for them, in the first place.

By Mr. Schafer:

Q. I'm sorry. Asked—from his attorneys.

The Court: Well, ask the question again.

By Mr. Schafer:

Q. Did you ask the Plaintiff's attorneys for the copies of the Morton invoices from which you could determine Morton's product mix in the Salt Lake City market over the four years in question?

A. I didn't ask the attorneys, Mr. Schafer, because we're still in the process actually of going through those invoices.

Q. Are you aware, Mr. Caldwell, that those invoices were produced on the deposition of Mr. Chapman, who appeared here on the stand several days ago, in October of 1961?

The Court: Tell us how many of them there are.

Mr. Schafer: I have a stock of them, your Honor, and they amount to about that much (indicating).

The Court: Is that microfilm?

Mr. Schafer: No, no, no.

The Witness: Mr. Schafer, the Salt Lake invoices were not segregated. They were *comingled* with the eastern invoices, the western invoices. I would just roughly estimate maybe ten, fifteen thousand.

[fol. 303] By Mr. Schafer:

Q. Are you aware that that's what the plaintiff's attorneys have asked us to produce for them?

A. I don't know what they asked, Mr. Schafer.

Q. Are you supposing or suggesting, Mr. Caldwell, that we gave the attorneys 15,000 more invoices than we had to give them?

A. I don't—

Mr. Alioto: If your Honor please, I object.

The Court: The witness's answer is stricken. The line of questions is stricken. The jury is instructed wholly to disregard this line of inquiry.

By Mr. Schafer:

Q. Are you aware, Mr. Caldwell, whether or not Morton was ever asked particularly for the invoices reflecting sales in the Salt Lake City market?

A. Mr. Schafer, on Sunday I met with Mr. Muth. He had the Salt Lake invoices isolated. They were a stack approximately like this (indicating).

Q. Watch it. They aren't.

A. Well, like that, then (indicating).

Q. Not that big.

A. And I said, "We should have a copy of the Salt Lake invoices isolated for whatever purpose they may subsequently be used." And I was informed that we had copies of the Salt Lake invoices on this microfilm.

Q. This is last Sunday. You weren't informed—what's today? Last Tuesday, maybe. That your attorneys were given isolated invoices for the Salt Lake City market and told by me that I was going to introduce those invoices into evidence?

Mr. Alioto: I believe that's admitted, if your Honor please. It's not relevant to any issue, but I do want to say this. If he is opening up a question of his good faith compliance and production, I'm perfectly willing to let him open it up.

Mr. Schafer: I'm perfectly willing to defend it, if that's an issue in this case, which it's not.

The Court: If you keep on pursuing it, it's obviously going to be. I don't see any sense in introducing that issue into this case.

Mr. Schafer: What I'm pursuing right now, your Honor, is whether or not the witness sought to get the best evidence of what he's testified is the best evidence as to what the product mix is.

[fol. 304] The Court: Well, why don't you ask him?

By Mr. Schafer:

Q. Did you seek to get the best evidence of what the product mix was from Morton in the Salt Lake City market?

A. Yes, sir.

Q. And when did you do that?

A. At the inception of computing this schedule.

Q. When was that?

A. The original copy of the schedule, which was not in the complete form, was furnished you the early part of January.

Q. I'm not asking you when you furnished us anything. I'm asking you when you say you asked us for invoices.

A. I don't know when the attorneys asked for the invoices.

Q. Now, you didn't ask for invoices, I take it?

A. It was probably prior to the time that I was ever engaged on the case.

Q. Now, you're guessing, I take it, as to whether or not the attorneys—

The Court: All right.

Mr. Alioto: The question calls for guessing.

The Court: All right. We're going to put an end to this line of inquiry entirely. Now, if you have anything you want to inquire about on any other subject, proceed to do so. Cross examination on this subject is terminated.

By Mr. Schafer:

Q. Instead of acquiring the best evidence of what Morton's product mix was, as I understand it, you imported into the Morton study, Carnation's product mix; is that correct?

A. Yes, sir.

Q. Why did you do that? Because you'd get higher costs out of that?

A. No, sir, absolutely not, because it was the best information available at that time. Secondly, I think it's being greatly overemphasized by the same fact that I mentioned before. There are many instances here, and probably more instances when the price of each flavor is exactly the same.

Q. Is there any instance where in 1961, for instance, the cost is exactly the same?

A. No.

Q. And that's relevant, isn't it, because you used the product mix to determine your composite cost; is that not correct?

A. It would be relevant as far as costs are concerned, but certainly I would say this, Mr. Schafer, that in most [fol. 305] instances the apple cost is lower, and of course in the product mix any deviation as far as the percentage of apple in relation to the other flavors would be the most important factor in determining whether or not product mix was important at all. And it would seem from all of the information in the estimates that have been made in interrogatories and so forth as to this product mix that apple is always constantly between, say, forty and fifty per cent, maybe a little higher than that, a little lower, but the percentage deviation certainly would not be enough to substantially affect this scale.

Q. Let's just think about that for a minute, Mr. Caldwell. Your product mix for apple with which you used to develop Morton's average costs—

A. Yes, sir.

Q. —took a figure of 41.7 per cent; is that correct? I'll show you. Have you got it?

A. In 1961 only.

Q. I was thinking of '61.

A. Yes, sir.

Q. Indeed. Now, supposing I told you, Mr. Caldwell, that when you analyzed Morton's invoices of sales for the year 1961 that Morton's product mix on apple is not 41.7 per cent, but 82.9 per cent, would it still be your testimony that that was not a significant deviation?

A. It may or may not be. I can't say what the impact would actually be and the net result.

Q. If it's 82 per cent, instead of 41 per cent, it will just about double the effect of the Morton cost of apple, producing apple pies, from what you show in your schedule; is that not correct?

A. Not necessarily, because that same percentage is applied against the sales price, and ordinarily the sales price of apple is also lower, and the effect may be absolutely nil.

Q. I thought you just finished testifying that usually the product mix makes no difference in respect to the selling price because the prices are all the same?

Mr. Alioto: He didn't say that, counsel. I object to that as misstating the record, if your Honor please.

Mr. Schafer: Could we read it back, so we make sure that I'm not misstating the record? I would like very much to read that testimony back, your Honor. I don't want to be accused of misstating the record, if I'm not.

The Court: Why don't you ask the witness if that's what he said?

By Mr. Schafer:

Q. Did you not testify to me, sir, about four minutes ago that the question of product mix and whether or not you used Morton's product mix or Carnation's product mix was really immaterial because the selling price was usually the same throughout the period?

[fol. 306] Mr. Alioto: This is different. He said, "usually." The first question was, "always the same."

Mr. Schafer: I didn't say, "always." I didn't say, "always."

The Court: Let's quit arguing about it. Ask the witness what you want to ask.

By Mr. Schafer:

Q. I've got the question pending.

A. Usually I would say that that is correct. I did say that, Mr. Schafer. However, you're talking about 1961, now.

(Question read.)

A. And I did not say that all of them. I said that preponderantly all of them were the same. But when we get into 1961 is when we get the price variations in the price of apple versus the other flavors.

Q. Now, let's take that, Mr. Caldwell. Let's inquire about that statement. Your schedule shows for Morton on 5/22/61 a weighted average net sales price of $3.30; correct?

A. Yes, sir.

Q. And shows a net weighted average manufacturing cost of $2.94. Right?

A. Yes, sir.

Q. Now, if it's a fact, Mr. Caldwell—and we won't take time to do the arithmetic if you'll accept my statement for it—if it's a fact that with Morton's product mix in there instead of Carnation's product mix in there, that that weighted average manufacturing cost is $2.58, would not that seriously undermine that analysis of 5/22/61?

A. It depends on what you mean by "seriously". It would have some effect on it, Mr. Schafer. But also this schedule is prepared in a manner that you can independently determine the per dozen on apple, if you wish, you can compute it on cherry, if you wish, without any weighted averages.

Q. But that isn't what you did, though, is it?

A. We've presented it here, and we've also presented the weighted average primarily, because an objction was raised in regard to the original schedules that some weighted average should be applied. And so this indicates both ways. You can independently determine the P. and L. on apple per dozen or cherry per dozen or boysenberry per dozen or peach per dozen, or you can use the weighted average, whichever way you choose.

Q. I quite agree with all of that, Mr. Caldwell. It's not responsive to my question, however. Will you accept my further mathematical computation in respect to 5/22/61

that under the heading "Net Sales Less Manufacturing Costs" you now show a figure of 36 cents?

A. Yes, sir.

[fol. 307] Q. Now, will you accept my statement that if you used instead of the Carnation product mix, if you used the Morton product mix, you'd have a figure under the heading of 71 cents? Almost precisely double?

A. Well, you would have to know the—

Q. No. Will you accept my statement that those are the numbers involved? 36 cents on your data; 71 cents using Morton's data?

A. No. On a weighted average basis?

Q. Morton's weighted average basis.

A. I'm sorry, I'm not mathematician enough to work that out in my head.

Q. Then you won't accept my statement for it?

• • • • • • •

By Mr. Schafer:

Q. You testified to Mr. Lamb that you prepare income tax returns from time to time?

A. Yes, sir.

Q. And I think you testified to me today that when you used this product-mix concept, you were using it in part to determine a weighted average cost, right?

A. Yes, sir.

Q. So that you are using the product mix to determine a cost factor?

A. Yes, sir.

Q. Is it customary, or have you ever before, Mr. Caldwell, in preparing an income tax return for a corporation, have you ever imported into that corporation's income tax return the cost data from some other corporation?

A. No, sir.

Q. That would not be in accord with good accounting principles, would it?

A. No, sir.

Mr. Alioto: If your Honor please, I don't see any relevancy of preparing income tax returns in connection with making a projection and an estimate, under the criteria provided for in the Bigelow case.

The Court: Sustained.

Mr. Schafer: Your Honor, he has imported other corporations' cost factors into this report.

The Court: All we are talking about is income tax returns. I have sustained the objection to making any comparison with the income tax returns.

* * * * * * *

[fol. 308] By Mr. Schafer:

Q. Now, you have done the same thing, as I understand it, with respect to spoils, Mr. Caldwell. You have taken some other corporation's data on spoils, and you laid that into this cost study of Morton's, is that correct?

A. Yes, sir. I think that has been explained before, the basis for that.

I might add this, in connection with Continental, which is the only additional factor which is different from the testimony in connection with Carnation, and that is this, that in your operating statements, which you gave us, you do have cost of goods sold and other costs, which are really unidentified in coming down to your gross profit figure. I might—

Q. I am sorry. I didn't hear you on that, I am sorry.

A. You used a cost of goods sold, which we assumed to mean the actual cost of the product sold. Then you further, in that same—right underneath that you indicate other costs. Now, we have given no consideration to that in preparation of these schedules, and assume that it is either spoils or certainly would be in lieu of spoils, as far as the 2 per cent factor is concerned.

Q. If you did assume it to be spoiled, you did give it consideration, didn't you?

A. Except we did not include, as an expense item, these other so-called costs, which are unidentified.

Q. If you assumed it to be spoils, you included it?

A. We included it as spoils, but if it—

Q. Then it is included, Mr. Caldwell?

A. No, you either had the spoils absorbed in your cost of sales, or they were this other cost-of-sales item which is unidentified.

Q. Did you look in the Morton invoices for any spoils payments in the Salt Lake City market? You have testified yesterday that you found two in the San Francisco market.

A. I have a few more invoices, Mr. Schafer. Time has not permitted, of course, to go through the invoices completely at this time.

Q. Is your answer "yes" or "no"?

A. The answer is: We have credits indicating merchandise returned, or damaged merchandise. Again, as yesterday, I can't tell you whether they are meat pies or what product they may pertain to. I have several of them here. If time had permitted, I am certain we could have received more.

Q. There are none from the Salt Lake City market, are there, Mr. Caldwell?

A. I didn't determine the marketing area.

[fol. 309] Q. Shall we wait while you do?

A. Well, it would be quite a wait, I am sure.

Q. I just went through them.

The Court: Well, we are not going to wait. Go ahead with your examination.

By Mr. Schafer:

Q. Will you accept my statement for it, Mr. Caldwell, that there are none from the Salt Lake City market?

A. If you have examined them. I see some here for Denver, Colorado.

Q. That is not the Salt Lake City market.

A. It is pretty close.

* * * * * * *

By Mr. Schafer:

Q. There are no spoilage payments shown there for any customer of the Morton Company with an address in Salt Lake City, is that correct?

A. That is correct.

Q. Are you aware, Mr. Caldwell, of the sworn testimony in this case under oath that Morton didn't have to pay any spoilage payments in 1961 in the Salt Lake City market?

• • • • • • • •

By Mr. Schafer:

Q. Are you aware of it?

A. No, sir.

Q. If you had been aware of it, would it have been good accounting principles to put spoilage payments into your cost study in spite of that sworn statement under oath?

A. We would have to take the spoilage out, if that is a true statement, and insert the so-called other cost items, which would probably be the same equivalent.

Q. You would just guess that other cost items had something to do with Salt Lake City?

A. It is very difficult to pinpoint right to the penny any of these items, Mr. Schafer. We have to work with the best information available.

[fol. 310] Q. You haven't done so, have you?

A. Yes, sir.

Q. Now, you testified to me yesterday, Mr. Caldwell, that this study was developed on the basis of Morton's cost to doors of product manufactured?

A. Yes, sir, including the Bright and Parkway co-pack prices.

Q. Yes. Are you aware that those—I am sorry, those aren't in evidence.

Where, Mr. Caldwell, if you know, on this study are the Cost to Doors reports for the second quarter of 1961 reflected?

• • • • • • • •

A. Mr. Schafer, was that the first quarter of 1961?

By Mr. Schafer:

Q. Second quarter of 1961.

A. That would have had to have been the Parkway costs, inasmuch as we have no costs for the second quarter of '61 from Webster City.

Q. Right. And what is the figure?

A. For which flavor?

Q. Apple.

A. Apple would be $2.58.

Q. No.

A. $2.47.

Q. $2.47. Does that figure appear on your cost analysis here?

A. It doesn't seem to. It seems to be $2.58.

Q. So that is wrong, isn't it?

A. There is another figure down below it.

Q. Which reads?

A. $2.58.

Q. Which reads, "Cost last quarter," right?

A. It is rather dim. I can't tell you what it reads.

Q. So you got that wrong?

A. If that first figure is the correct figure, then there is a 10-cent differential.

Q. That is pretty significant, isn't it? If your product is 81 per cent apple, that is pretty significant, isn't it?

A. It couldn't make any more than 10 cents total.

Q. Ten cents, when 81 per cent of the product is apple?

A. It would depend on the product mix and the other items, with the remaining percentage, and again would require a recomputation.

Q. That's right. And if apple is 82 per cent of Morton's sales, that is a pretty significant difference, isn't it?

A. It depends what you mean "significant," Mr. Schafer.

Q. I agree. So that, Mr. Caldwell, the figures in that column would be wrong, wouldn't they, manufacturing costs per dozen of apple?

A. There is one other check I would have to make, Mr. Schafer, because subsequent to receiving these, I think we [fol. 311] received some invoices from Parkway. Which figure they would indicate I don't know. I don't have that schedule in hand. If the first figure is correct, there certainly is a 10-cent error, a very innocent error, and I certainly—that's all I can say.

Q. Are you aware you have had the Parkway invoices available to you for about two months?

A. Yes, I knew we had them.

Q. How about cherry, that is wrong, too, isn't it?

A. If they are all taken from the bottom line, they would all be in error, yes, sir.

Q. Boysenberry would be wrong?

A. Yes, sir.

Q. And peach?

A. Boysenberry.

Q. Peach would be wrong?

A. Yes, sir.

Q. And your average weighted manufactured cost figure would be wrong, for two reasons, that those numbers are wrong themselves and because you used the wrong product mix, would that be right?

A. If that be the case, yes, sir, Mr. Schafer.

Q. And therefore your net sales less manufacturing costs would be wrong?

A. It would be wrong clear across the line, except the unit prices on the other expenses.

Q. Right.

A. If the top line is the correct line, that would be correct. If the bottom line is the correct line, then that would be correct.

Q. What is the source—I think you testified yesterday to me the source of your price data that you used on this schedule.

A. The source of the price data was the net price study which we prepared and furnished to you early in January,

which consisted of a study on your price list and deal sheets.

Q. And that was based upon a study supplied to you by Morton, is that correct, Morton's attorney?

A. Yes, sir.

Q. And you checked that out for accuracy, is that correct?

A. Yes, sir.

Q. And you amended your study slightly to accord with some suggestions made by Morton's attorneys, is that correct?

A. Yes, sir.

Q. And you are now satisfied that the study is correct, I take it?

A. Yes, sir.

Q. Is that the same study you used for the Carnation and Pet documents of this nature?

A. Yes, sir.

Mr. Schafer: I would like to offer, your Honor, that exhibit into evidence as Morton's exhibit next in order.

(Defendant Morton's Exhibit No. 8 was thereupon marked for identification.)

[fol. 312] By Mr. Schafer:

Q. Would you just identify this, Mr. Caldwell, as being the document that you prepared?

A. Yes, sir.

* * * * * * *

By Mr. Schafer:

Q. So that the validity, I take it, the validity of the percentage you get here, which you used to throw back in and compute a brokerage in other direct selling expenses—the validity of that figure depends upon the direct marketing costs?

A. Yes, sir.

Q. Would you look with me at the direct marketing cost category?

A. Yes, sir.

Q. "Special Promotions," do you see that heading?

A. Yes, sir.

Q. Do you know what they are?

A. No, sir.

Q. Supposing I told you that special promotions are what we have come to know in this case as temporary price discounts and advertising allowances, would it be proper in your view to include that figure of 44,000 in the direct marketing costs?

A. If that were the case, it would not be proper.

[fol. 313] Q. It would not be proper?

A. No, sir, provided those same special promotions, and so forth, have been taken from the sales price, which we have tried to do.

Q. Yes, and which you have done in computing your price data?

A. Yes.

Q. Right. Now, the other categories, Mr. Caldwell, within the direct marketing costs, you have a heading there "Advertising," right?

A. Yes, we have—yes.

Q. National advertising, you assume?

A. It could be any type of advertising.

Q. It is not co-op advertising, is it?

A. No, because there is another advertising we indicate as co-op advertising, which we have eliminated.

Q. And it is not what we have come to know as advertising allowances in this case?

A. Well, my understanding is that the co-op advertising is represented by advertising allowances.

Q. My question to you, sir, was that the advertising figure listed here would not include the advertising allowances?

A. No. That would be my understanding.

Q. So that is out. And the co-op advertising you have already taken out. Traveling and entertainment, do you know whether there was any traveling and entertainment devoted to the sale of fruit pies in Salt Lake in 1961?

A. No, I don't.

Q. So you just assumed that, but you didn't have any proof of that one?

A. No, sir.

Q. How about salaries and commissions? Would that be a fixed expense according to your understanding of accounting data?

A. It may or may not, because commission, of course, would vary with volume.

Q. You have a heading, "Broker's Commission," have you not, sir?

A. Yes, sir.

Q. Wouldn't that be the category that would vary according to buying?

A. The category above that is "Salaries and Commissions," and I assume there would be some variable factor there also.

Q. Who, do you suppose, in the Salt Lake City market, working for Morton, would fall in the "Salaries and Commissions" bracket?

A. I would have absolutely no idea.

Q. You don't know of anybody, do you?

A. No, sir.

Q. So that of those four categories we have included in direct marketing costs, which you have included in direct marketing costs,—I'm sorry, five in there—only one belongs there, is that right?

A. No, sir.

[fol. 314] Q. Only one do you have any proof that any monies were devoted to the sale of Morton frozen fruit pies in the Salt Lake City marketing area in 1961? Broker's commission is the only one?

A. As far as proof is concerned?

Q. Yes, proof.

A. In my opinion, based upon this information, they all properly belong there, to my knowledge. It has been computed, broken down, under a percentage approach because we lacked the per-dozen volume to tie into the operating figures, and therefore we have been forced to use the percentage approach to come up with this same answer.

Q. I recognize the percentage approach. I am not arguing with it. What I want to know is: In using that percentage approach, you had to use direct marketing costs, and that is what you did, that was your approach?

A. Yes.

Q. The direct marketing costs are comprised of five items, right?

A. Yes, sir.

Q. You only know as a fact that Morton had to devote any money to the sale of Morton frozen fruit pies in 1961 in Salt Lake City to one category?

A. I am not even sure of that one category.

• • • • • • •

By Mr. Schafer:

Q. Of those direct marketing costs, Mr. Caldwell, we talked of salaries and commissions. Would you agree with me that that would be a fixed cost, not variable in terms of volume of sale?

A. No, sir, I would not agree.

Q. For travel and entertainment?

A. No, sir. I think there's certainly a relationship between travel and entertainment and sales.

Q. You mean that every dozen pies that you sell in Salt Lake City affects your travel and entertainment expense?

A. Not necessarily, but I'm sure that there would be a relationship between travel and entertainment and selling pies in another area, unless it were all consummated on the telephone or something of that nature.

• • • • • • •

Mr. Schafer: Would you mark this Morton's Exhibit 9 for identification, please.

(Defendant Continental's Exhibit No. M9 was thereupon marked for identification.)

[fol. 315] Mr. Schafer: Your Honor, in terms of Morton's No. 8 which I offered and your Honor said that he would wait until there was some resolution—

The Court: Well, that's what we've been doing all during this trial.

Mr. Schafer: I just wondered if in respect to the Continental prices on which both sides are agreed are accurate we could have admitted as to Continental only.

Mr. Alioto: Just a minute. We have made no agreement that your prices are accurate. We haven't had your original records at all. We're willing to say that they're as accurate as the records you have given us indicate. That's as far as we're willing to go with that.

Mr. Schafer: Your Honor, I don't mean to contradict Mr. Alioto, but Mr. Caldwell was up in our hotel room and had access to all the data and agreed they were accurate.

Mr. Alioto: I don't think we've had access to all of your data, even today.

The Court: I'll reserve—

Mr. Schafer: Well, now, I resent that and move that be stricken, your Honor.

The Court: It's stricken. I'll reserve a ruling.

Mr. Schafer: I really think those remarks are offensive.

The Court: Well, I say they're stricken.

Mr. Schafer: Yes.

By Mr. Schafer:

Q. Do you recognize, Mr. Caldwell, Morton's No. 9 for identification?

A. Yes. I think this was an original study which had been prepared.

Q. By you?

A. Yes, sir.

Q. To the same, I take it, effect as Morton's No.—I mean, Plaintiff's No. 23, I think it is? The purpose was the same?

A. Yes.

. . . . . .

[fol. 316] A. I've had staff members assist me pursuant to instructions in these computations. I had no idea that this would ever become a document, because there have been very substantial changes even made pursuant to your request in regard to other items. This does not purport to be a correct schedule, certainly.

Q. When you gave it to us and said, "This is what we're going to put into evidence," it didn't purport to be a correct schedule?

A. It was as correct as we could possibly make it with the time element—

. . . . . .

Q. But you testified that contribution to profit means to you a measure of the amount of money that somebody makes before they start allocating these other expenses? Right?

A. Not necessarily. Down to that point, whatever profit results at that point can be used to offset whatever other expenses they have. You could actually say that the gross profit is a contribution to profit. You could say that the profit after your cost of sales, your shipping cost, your advertising, is a contribution to profit.

Q. That's what this is, isn't it?

A. You could insert the so-called contribution to profit at any point in your income statement.

Q. Supposing you insert it after, "Direct Marketing Costs." Does that mean to you that a profit is shown up to the point where, as an accountant, you start allocating other expenses?

A. Not necessarily, no, sir. Those expenses have to be absorbed someplace.

Q. What expenses? The fixed expenses?

A. The allocated expenses.

Q. Right.

A. From whatever source there might be.

Q. Right.

A. You don't have enough profit until you get down to the absolute last figure.

Q. I understand that. But if you make a figure—if you come up with a plus figure in the contribution to profit, it gives you something to allocate to those other expenses? Isn't that right?

A. Yes, sir.

Q. And if you have a loss, you don't have anything to allocate? Right?

A. That's true.

Q. And if you have a profit, it cuts down the amount that you have to allocate from other sources of income; isn't that correct?

The Court: I don't know what that's got to do with the lawsuit.

[fol. 317] Mr. Schafer: It's got to do with the lawsuit—

The Court: If you say it's got something to do, let's get to it.

Mr. Schafer: I'm not getting through to the witness.

Mr. Alioto: You're getting through very well to the witness. He knows what you're getting at.

Mr. Schafer: Why doesn't he come back to me with an answer—

Mr. Alioto: He's answering you, and he's answering you responsively.

By Mr. Schafer:

Q. If it were a fact, Mr. Caldwell, that the data shown on Number 23 under, "Division and Other Expense on Basis of Sales," if it were a fact that those categories of cost were fixed costs, would it be true that the Morton

Company was better off having made a plus figure in the Contribution to Profit?

A. The only way that that could be answered, Mr. Schafer—you say that they are fixed costs?

Q. Right.

A. How much would the fixed costs have been reduced companywise had you not been in the business? I think that question would have to be answered to determine whether or not you were better off.

Q. If you made money that you could allocate to fixed costs, isn't it perfectly apparent that they wouldn't have to be reduced by reason of being in the business?

A. May I just give you an example, Mr. Schafer? If you have a company that reaches—any company—that reaches this contribution to profit before division and other expenses—let's take the first year—$3,300. Under your so-called fixed expenses—call them what you wish—but they're nonetheless expenses—there are no other divisions in this particular instance to absorb those costs; then if those costs represent a cash outlay, then I cannot conceive that it's been better off for that company to be in business because they have lost money.

Q. If they have to absorb those fixed costs anyway, whether or not that line of business exists, if those fixed costs have to be absorbed anyway, it is nevertheless your testimony that the company isn't better off if it comes up with a plus figure under, "Contribution to Profit"?

[fol. 318] A. My example cited that there is no place else to absorb those fixed costs.

Q. What do you mean by no place else to absorb those fixed costs?

A. Because we're talking about not the case of Morton, where perhaps it can be absorbed in another operating division. We're talking about the normal situation where you have a company that cannot—they would certainly have to—yes—absorb those costs. And if they still wind up with a net loss, and then it has not been an advantage

for them to be in business under anyone's concept. Now, if you say—if you say—that other operating divisions would have had to absorb these divisions and other expenses and they would not have been reduced by virtue of going out of the pie business, then what you say is true.

Q. Yes. Now, let's just take the pie business, say, and let's, instead of talking about divisions, talk about markets. Now, supposing it's true that a division—and if you want to call it, say, Morton Division—supposing it makes money, it contributes to profit. All right.

A. Yes.

Q. Isn't the company better off having had the Morton Division in operation?

A. It would depend upon whether or not the other allocated expenses could have been reduced by virtue of the company not being in that market. That gets into your budget and forecasts. If you forecast a higher volume, it follows that your allocated expenses are probably going to be higher.

Q. Supposing, just taking the Morton Division, supposing that the Morton Division, selling in one market, sells above its direct costs, so that it can contribute to profit. Isn't the Morton Division better off having sold in that market, so that it has a plus figure from its operations in that market with which it can help defray the general overhead expenses of the Morton Division?

A. Not necessarily so, because some of those expenses that you anticipate to be absorbed in the profit contribution may nonetheless represent a cash outlay that wouldn't have been incurred otherwise.

Q. Take depreciation, Mr. Caldwell. Depreciation is a fixed expense, I take it? You've got plants, and you've got to write them off? Right?

A. Yes, sir.

Q. The plant is going to be there anyway, isn't it?

A. Yes, sir.

Q. Supposing that the Morton Division in its operations in one market, as I say, makes a plus figure in the contribu-

tion to profit category. Has that plus figure helped to defray the depreciation expense of maintaining that plant?

A. You're talking about the depreciation becoming part of your cost of sales item? And—

[fol. 319] Q. Depreciation is a fixed expense.

A. Would you state the question again, Mr. Schafer?

Q. I think you agree with me that depreciation is a fixed expense?

A. Yes, sir.

Q. The question is—and we can assume, I take it, that the plant that we're talking about is going to be there anyway. Right?

A. If that's your assumption, yes.

Q. Well, I'd like it to be your assumption, too.

A. All right, sir.

Q. Let's assume that the Morton Company won't tear down its plant in California where it's in or out of the Salt Lake City market.

A. Yes, sir.

Q. So that if the Morton Company is able to show that it makes money in terms of contribution to profit in a particular market, Salt Lake City or Seattle or any other market, isn't it true that that money has helped to defray the depreciation expense attributable to running that production facility?

A. It has helped to defray the depreciation expense, yes, sir.

Q. And in that sense the company is better off?

A. No, sir, because it depends on the relationship between depreciation and the other actual cash outlay that is presumably to be absorbed in the profit contribution.

Q. There is no cash outlay in connection with depreciation, right?

A. No, sir.

Q. And that depreciation has to be absorbed from the corporation's operations someplace, doesn't it?

A. Yes, sir.

Q. That means the depreciation has to be absorbed from the operation of the division in the various markets in the West, isn't that true?

A. Yes, sir. However, Mr. Schafer, depreciation very often is related to production. Equipment—very often a specialized type of equipment, that if it is not in use, it doesn't depreciate. It would depend on many circumstances, Mr. Schafer.

Q. When is depreciation related to production?

A. Very often. A contractor, for example.

Q. Does a person owning production facilities, like an automobile factory, or something like that, does he relate depreciation to production?

The Court: What has that got to do—

Mr. Alioto: I submit that has no conceivable relevance to what we are talking about. We are simply engaged in an argument.

[fol. 320] Mr. Schafer: I am trying to get an admission from the witness.

The Court: I think this is— We have gone on for an hour.

Mr. Schafer: I was about to finish.

The Court: I am not talking about your cross-examination, either. I am talking about on this subject. You have been on this subject an hour. I think there has been great liberality in permitting you to pursue it. Now, if you have anything else to talk about, let's do it.

Mr. Schafer: My only one remaining question was on the same subject, and if your Honor doesn't want me to ask it, I will stop.

The Court: No. His Honor is not going to get in any error in this record in stopping you from cross-examining the accountant on the other side. You pursue it. I will stay here all night, if necessary, for you to do it. The ladies and gentlemen of the jury may get a dinner on the Government.

All right, go ahead.

Mr. Schafer: I won't keep them more than five more minutes at the outside.

By Mr. Schafer:

Q. Taking the depreciation expenses again, Mr. Caldwell—

A. Yes, sir.

Q. Is it not unusual for a plant to be written off in twenty years, say, a pie producing facility or any other type of plant?

A. I don't know, Mr. Schafer.

Q. "Straight line basis" it is called, right?

A. Yes.

Q. And that is a common concept, I take it?

A. It is one of the concepts.

Q. Assume it is the Morton concept if you will.

A. Yes, sir.

Q. Now, if Morton, in its various operations in the various markets of the Western area, turns up with a plus figure in the contribution to profit category—

A. Yes.

Q. In any of the markets.

A. Yes.

Q. Doesn't that contribution to profit defray, help defray, the depreciation expense that you and I have agreed is on a straight line basis?

[fol. 321] A. Yes. That is, assuming that you already have the plant, that this area has not created any additional acquisitions of equipment which you would not have if you were not operating in that area, yes.

Q. Yes, that is your answer. So that, on those assumptions and qualifications that you have just stated—

A. Yes.

Q. (Continuing) —if the Morton Company, in its operations in the Salt Lake City market, contributed to its profit in 1961, it helped, among other things, to defray its depreciation expense, is that correct?

A. That would be correct, based upon those assumptions.

Q. And insofar as those—

The Court: I thought you said you had one question.

Mr. Schafer: And then I sort of qualified it with "five minutes," your Honor.

The Court: Go ahead.

By Mr. Schafer:

Q. Insofar as the operations in the Salt Lake City market helped to defray that depreciation expense, that burden of depreciation expense was raised or lifted to that extent from its operations in other markets and other products, isn't that correct?

A. Based upon the assumptions that we have stated, that is correct, Mr. Schafer, yes, sir.

Q. So that would improve their profit showing, isn't that correct?

A. At what level are you talking about?

Q. Well, I will withdraw the question if it is going to be complex. I will withdraw that question. But on the assumption that Morton, in its operations in 1961, helped to defray its depreciation expense, wasn't the Morton Company better off having operated in the Salt Lake City market, to that extent, to that limited extent, if you will?

A. To that limited extent and based upon the assumptions stated, yes.

Mr. Schafer: No further questions.

Redirect examination.

By Mr. Alioto:

Q. Mr. Caldwell, just one set of questions. Counsel has spoken of the sales below all of its costs as a contribution to profit. You have heard that expression. Is it not a fact, Mr. Caldwell, that if all of the pies of the Morton Company contributed to profit in the same way, the Morton Company would be broke?

[fol. 322] Mr. Schafer: I don't understand the question myself, and I don't think the witness is competent to answer for the Morton Company.

The Court: Let's just see if the witness is. Go ahead. Answer the question.

Mr. Schafer: Does he know, your Honor?

A. Their present capital would be greatly reduced.

By Mr. Alioto:

Q. In other words, if all of the products contributed to profit in the same way, the result would be overall loss, wouldn't it?

A. Yes.

Q. And the only way that can be called a contribution to anything is if it is subsidized from profits made elsewhere?

A. Yes, sir.

The Court: How much more cross-examination of this witness is there?

. . . . . .

Mr. Billings: I make the same objection to Exhibit 26 as I did to 22, your Honor.

The Court: All right. Now, what are being offered? What are the numbers being offered?

Mr. Alioto: Twenty-four, Plaintiff's Exhibit 24, is being offered, a comparison of the net sales price per dozen in the Salt Lake City division with net sales price per dozen in all of the sales divisions of Pet Milk Company. We will offer it.

[fol. 323] The Court: Received in evidence.

(The document marked Plaintiff's Exhibit No. 24 for identification was received in evidence.)

Mr. Alioto: Twenty-five is being offered, if your Honor please. This is a comparison of the gross sales price and the net sales price per dozen for Pet-Ritz brand pies be-

tween Salt Lake invoices furnished and the total sales by the Pet Milk Company.

The Court: Received.

(The document marked Plaintiff's Exhibit No. 25 for identification was received in evidence.)

Mr. Alioto: Twenty-six, if your Honor please, is the Carnation Company comparison of the Pacific Northwest-Mountain States Division operations with all other frozen food division operations.

The Court: Received in evidence.

(The document marked Plaintiff's Exhibit No. 26 for identification was received in evidence.)

The Court: As far as the cross-examination of this witness, I would like to know whether you are through.

• • • • • • •

[fol. 328] Mr. Billings: Your Honor, at the close of court yesterday afternoon Mr. Schafer had offered what had been marked for identification as Defendant's Exhibit M-8, and I raised as you remember, some question about it with respect to the figures on Carnation. We have had these figures overnight and there are one or two minor arithmetical errors which we will submit to counsel for plaintiff over the weekend, but, subject to those, we have no objection to its introduction in evidence.

The Court: Do you offer it now, Mr. Alioto?

Mr. Schafer: I was offering it.

The Court: Oh, it is your offer.

Mr. Schafer: Yes.

Mr. Lamb: I have no objection, your Honor.

The Court: All right. Mr. Alioto, do you have any objection?

Mr. Alioto: No, if your Honor please, subject to any correction, again, that may be dictated, we have no objection, and we will work out these corrections.

The Court: Very well. Subject to your making the corrections.

Mr. Billings: Yes, we will get it over to Mr. Alioto over the weekend.

The Court: Very well, it is received in evidence.

(The document marked Defendant Exhibit M-8 for identification was received in evidence.)

[fol. 329] Mr. Schafer: I should like to offer in evidence Morton's Exhibit 9 for identification. I am offering it not for the truth of it, but as an admission. This was a document prepared by Mr. Caldwell.

Mr. Alioto: This was a document prepared earlier, which I understand was then corrected as a result of conversations between our two accountants.

. . . . . .

Mr. Schafer: I am offering it, your Honor, only as an admission as to the method by which these computations were arrived at, and what they did and what they didn't do, I am not concerned about the numbers—

. . . . . .

Mr. Schafer: No, that is not accurate, your Honor. We didn't work that out. They changed their method. I am interested in why they changed their method.

Mr. Alioto: If it is being offered only to show a change of method, rather than for the truth of the facts therein stated, as I have indicated, I have no objection.

The Court: All right, it is received.

(The document marked Defendant Exhibit M-9 for identification was received in evidence.)

. . . . . .

(The documents marked Defendant Exhibits M-1 and M-2 for identification were received in evidence.)

Mr. Schafer: Thank you, your Honor.

Mr. Alioto: If your Honor please, before turning to the Defendant Pet, I would like to offer this last exhibit against the Morton Company, Morton Frozen Foods, which

are a series of invoices of prices to Safeway Stores in San Francisco in July of 1961, and to other customers on the West Coast in August of 1961.

[fol. 330] We will call it to the attention of the jury at a later point, but at this point we offer them in evidence.

Mr. Schafer: My objection is that they are cumulative to what Morton has never denied. I think your Honor will appreciate my position.

The Court: I understand. The objection is overruled. They are received in evidence.

(Plaintiff's Exhibit No. 34 was thereupon marked for identification and received in evidence.)

* * * * * * *

[fol. 331] George D. Wohlhueter called as an adverse witness by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Wohlhueter, will you be good enough, please, to state your full name for the jury.

A. George D. Wohlhueter.

The Court: Will you spell that name for the court reporter.

A. (Spelling) W-o-h-l-h-u-e-t-e-r.

By Mr. Alioto:

Q. Where do you reside, Mr. Wohlhueter?

A. St. Louis, Missouri.

Q. What is your business or occupation?

A. I am controller for the Frozen Foods Division of the Pet Milk Company.

Q. For how long a period have you been the controller of that company, Mr. Wohlhueter?

A. Since September of 1961.

Q. Of 1961?

A. Yes, sir.

Q. And prior to that time were you employed by the Pet Milk Company?

A. Yes, sir.

Q. When did you first commence your employment with that Company?

A. Twenty-six years ago.

Q. That would be in 1937, '38?

A. '37.

Q. 1937?

A. That's right.

Q. And what capacity did you have at that time, Mr. Wohlhueter?

A. I was in the accounting department.

Q. Starting from that point, could you very quickly and concisely give us a history of what other jobs you assumed and what functions you discharged from that time until the point that you became the controller?

A. Yes, sir. I worked in various accounting functions in the St. Louis Accounting Department of the Pet Milk Company until September 30, 1955. At that time I became controller of the Pet-Ritz Foods Division of the Pet Milk Company and served in that capacity until about March of 1959 when I became budget manager of the Pet Milk Company.

Q. What year did you become the budget manager?

A. In March of 1959.

Q. And then you went from there to the comptroller of the company in '61?

A. To the comptroller of the frozen foods division in 1961.

[fol. 332] Q. Yes. Now, in connection with your duties as the budget manager, did that include making up the budgets for the frozen food division?

A. No, sir, it did not.

Q. Did you do any work at all on those budgets?

A. Yes, sir, we consolidated the budgets from the various divisions of the company.

Q. Therefore, you are familiar with the manner in which those budgets for the frozen food division were made up?

A. Yes, sir.

Q. Now, who was the chief executive officer of this company at the present time?

A. Of the Pet Milk Company?

Q. Yes, sir.

A. Mr. T. R. Gamble.

Q. And Mr. Gamble resides in St. Louis?

A. That is correct.

Q. And he is presently in St. Louis?

A. I couldn't say. I don't know.

Q. At least, he is in the country at the present time, is he not?

A. As far as I know, yes.

Q. Would you be good enough to identify Wilson Hall for us? Who is he?

A. He is a former sales manager of the frozen foods division, and subsequently for frozen foods product manager of the milk products division of the Pet Milk Company.

Q. Is he still with the company?

A. No, he is not.

Q. Where is he located?

A. The last I heard he was in Los Angeles, California.

Q. And would you be good enough to identify a Boyd F. Schenk?

A. He is my immediate superior. He is general manager of the frozen foods division.

Q. Now, is Mr. Schenk presently in St. Louis?

A. I do not know.

Q. He's at least presently in the country?

A. He is in the country.

Q. And he resides in St. Louis?

A. Yes, sir.

Q. And his office is in St. Louis?

A. Yes.

Q. And he is the head of the frozen foods division?
A. Right.
Q. At the present time?
A. That is correct.
Q. What is the name of the chairman of your board?
A. Mr. R. L. Latzer.
Q. Yes. And incidentally, are there any directors of the Pet Milk Company presently in Salt Lake City?
A. I couldn't say. Mr. Harter, S. P. Harter resides here. I don't know whether he is in Salt Lake City or not.
[fol. 333] Q. Mr. Latzer is not in Salt Lake City?
A. No, sir.
Q. Or his son?
A. No, sir.

Mr. Alioto: At this time, if your Honor please, we offer into evidence as Plaintiff's Exhibit next in order what has heretofore been marked as Plaintiff's Exhibit 36. It is an interoffice communication in the Pet organization.

Mr. Lamb: I have no objection to this being received in evidence.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 36 for identification was received in evidence.)

By Mr. Alioto:

Q. Would you be good enough to tell us, please, who Mr. I. P. Grill is?
A. He's the western region sales manager for Pet Milk Company, Milk Products Division.
Q. Is he presently with the company?
A. Yes, sir.
Q. In what capacity? In that same capacity?
A. Yes.
Q. And how long has he held that western region sales manager, if you know?
A. I couldn't say. I don't know.

Q. And who is Mr. S. P. Harter, to whom this is addressed, among others?

A. Mr. Harter is senior vice president of the Pet Milk Company.

Q. Would you be good enough to tell us the nature of the document which I'm holding, 36 in evidence? It's called, "Management Report, November." Do you know, Mr. Wohlhueter, what the nature of a Management Report is in your organization?

A. No, sir, I've never seen one of those before.

Mr. Alioto: All right.

"Management Report by I. P. Grill, December 17, 1958, to S. P. Harter, St. Louis. Three copies."

And under the heading—this is an excerpt from that Management Report—under the heading, "Competitive Activity, Frozen Pies," appears the following:

[fol. 334] "Price pies are our most important competition, particularly in the Utah, Idaho, and Colorado areas. Utah Pie is by far our principal competitor in Utah and Idaho, and the number one selling pie with frequent featurings of 39 cents to three for a dollar. This same picture is true of Libby pies in Colorado. Since our recent success, distributionwide, in the Spokane area, price pies are at the present no longer an important factor. Montana also seems to have gotten away from the featuring of price pies."

By Mr. Alioto:

Q. Mr. Wohlhueter—

Mr. Lamb: If your Honor please, yesterday it was my recollection that you made a ruling that that was not to be done.

The Court: That what was not to be done?

Mr. Lamb: Just what was done here now.

The Court: You mean reading the exhibit to the jury?

Mr. Lamb: Yes.

Mr. Alioto: Oh, no.

The Court: I don't think I ever ruled that you couldn't read an exhibit to the jury.

• • • • • • •

[fol. 335] Mr. Lamb: If your Honor please, in order to expedite the trial, I'll be very glad to stipulate these documents in as evidence. I furnished them to him, and most of them relate to people—the signature of them—people that they went to are not Mr. Wohlhueter. Now, if counsel wishes to have them go into the record, I have no objection to them at all.

Mr. Alioto: On that basis I'll offer 37 without further authentication into the record.

The Court: Received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 37 for identification was received in evidence.)

[fol. 336] Mr. Alioto: I'd like to read a portion to the jury; and this time I will attempt to read in an even monotone, Mr. Lamb, if that makes you any happier.

Exhibit 37 is a letter to J. A. Dodge from Mr. H. A. Beasley and D. J. Nord, dated September 15, 1959.

By Mr. Alioto:

Q. Mr. Wohlhueter, would you be good enough to tell us who Mr. J. A. Dodge is?

A. I can tell you who—in what capacity he serves now.

Q. Yes, if you would.

A. I don't know what the date of the letter is. He is a vice president in charge of marketing for the Pet Milk Company.

Q. Thank you, sir. And Mr. H. A. Beasley, the writer of the letter?

A. I don't know what capacity he is.

Q. Mr. Darrell J. Nord, also the writer of the letter?

A. I understand that he was at one time the Salt Lake City Division Sales Manager. I have never met him.

Q. For Salt Lake City?

A. Yes, sir.

Mr. Alioto: This letter also goes to Mr. S. P. Harter. The subject is, "Management Letter, August 15 through September 15." And this paragraph under the heading: "See unfavorable factors affecting results." It reads as follows:

"Despite our steady growth generally, there are factors at work that dig holes in our operation. Utah Pies in the Salt Lake district are a constant check on our growth. With their price of $3.60 per dozen on popular flavors, they are selling a lot of pies. Morton's 22-ounce in the Denver area are being featured at 29 cents, and the gradual swing to the P. L. pies slows our progress somewhat. A. G. Denver is actively promoting their Ranch House brand, and this has robbed us of sales and distribution in several of their stores. Miller's with 'Top Taste' and Safeway's Bel Air are typical examples of what we mean."

Mr. Alioto: We'll offer under the stipulation of authenticity, now, Plaintiff's Exhibit 38; and this, if your Honor please, is a letter from Mr. Boyd F. Schenk to Mr. Dittman.

The Court: Received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 38 for identification was received in evidence.)

• • • • • • •

[fol. 337] Mr. Alioto: I will make it clear at this juncture that that document is being offered at this point solely against the Pet Milk Company, and it is not being offered against the Carnation Company at this point, nor is it being offered against the Continental Baking Company at this point.

The Court: Or Morton Division?

Mr. Alioto: Or the Morton Division of Continental Baking Company at this point.

The Court: And it's received with those qualifications and is not to be regarded as evidence against Carnation,

against Continental, or against the Morton Division of Continental.

Mr. Lamb: If your Honor please, may I have an instruction from the Court with regard to reading these documents? Once a document is read to a jury, does it have to be read in its entirety, or are you allowed to pick out parts of it and emphasize it?

[fol. 338] The Court: Well, what I do about that is let counsel do what he wants with it. If he wants to read a part, go ahead and do it; but if on the other hand, you interrupt and say, "I think this ought to be in context, and we ought to read the whole thing," then I make him read the whole thing.

Mr. Lamb: Your Honor, then, at this point, if Mr. Alioto intends to read it, I suggest that he read the entire document.

Mr. Alioto: I had intended to do that, Mr. Lamb. This letter, ladies and gentlemen, is dated June 23, 1960. It was written by a Mr. Boyd F. Schenk.

By Mr. Alioto:

Q. Identify him, again, please.

A. Mr. Schenk is general manager of the frozen foods division of Pet Milk Company.

Q. He's the head man, isn't he?

A. That is correct.

The Court: Will you lift your voice, please?

The Witness: Yes, sir.

The Court: I'm pretty close to you, but a little behind you there; so I can't hear you.

By Mr. Alioto:

Q. And he is your immediate superior?

A. He is my superior, yes.

Mr. Alioto: This interoffice memorandum is written to a Mr. D. T. Dittman.

By Mr. Alioto:

Q. Would you be good enough to identify him?

A. He's our national private label sales manager. He was at that time in 1960.

Q. And in 1960 would Mr. Dittman have been in charge of negotiations with the Safeway Company, for example, in connection with the private label, Bel Air?

A. This would have been one of his responsibilities, yes.

Q. There are carbon copies of this interoffice memorandum to a Mr. L. G. Leutwiler.

A. That was Mr. Schenk's immediate superior.

Q. And to a Mr. Gordon Ellis. Who is he?

A. That was Mr. Leutwiler's immediate superior. He was general manager of the Milk Products Division.

Q. And to a Mr. S. P. Harter.

A. Mr. Harter is senior vice president of the Pet Milk Company.

[fol. 339] Q. And he was over Mr. Ellis, or a senior vice president?

A. He is senior vice president.

Mr. Alioto: All right. This interoffice memorandum is entitled, "Visit to Utah Pie Company, June 23, 1960."

"On June 23 I visited the Utah Pie Company's only plant at 2323 South West Temple in Salt Lake City with Dick Dowell of Cannery Sales Company and Bill Elgrett of Utah Wholesale Grocery Company.

"Management. The business is owned and managed by William Rigby. His son, Gaylen Rigby, is responsible for sales. A brother of the elder Rigby seemed to be plant superintendent.

"Products. Frozen Pies. Baked unfrozen pies and specialty cakes. They make a baked cream pie, but no frozen cream pies.

"Marketing. Baked pies and cake are distributed locally. Frozen pies are sold in the Intermountain Area and in California. They have no outlets in the Pacific Northwest, but are desirous of some.

"Building. The building is of recent block construction, with offices and a retail sales room. Main production area used also for dry storage and a newly built zero storage room. The son indicated that they had an investment of $300,000.

"Equipment. Pies are produced on a straight line Coburn manual pie machine. Printed carton are closed in a Marapak H, and pies are conveyed to a Amerio plate freezer. Hot starch method is used with steam kettle for starch, which is poured over fruit and tubs. Dough is conventionally mixed.

"Capacity. Limiting factor is a plate freezer, which has a capacity of 1,400 pies. Freezing takes ninety minutes, which would indicate an average speed of 16 pies per minute. The pie machine was operating intermittently, with frequent stops to wait for the plate to clear. Rigby indicated they were turning out 10,000 pies per day and running ten to twelve hours, which ties in with the speed of the plates.

"Housekeeping and Sanitation. While the plant was somewhat cluttered, housekeeping and sanitation appeared entirely satisfactory.

[fol. 340] "Quality. Fruit supply I saw in the plant was all frozen. Apples were steam blanched pippins from California. Boysenberries were Sebastopol I.Q.F. Cherries were five plus one sugar-packed Utah cherries. I did not see any peaches, but was told they buy California Elbertas.

"Conclusion. From a competitive point of view, the Utah Pie Company has the following advantages: (1) Low overhead due to family management; (2) Non-union labor force; (3) Freight advantage into Intermountain markets. As they attempt to expand, their Salt Lake City location will become a disadvantage, due to the limited market potential. I believe their recent building expansion has created a need for volume in excess of their sales. This is evidenced by their interest in private label, an interest expressed to me in outlets from the Pacific Northwest.

"Other Disadvantages Noted were: (1) Less favorable purchasing position due to volume; (2) Higher fruit costs due to lower volume and lack of a capable purchaser; (3) Operation and efficiencies; (4) Lack of high speed automatic pie machine.

"As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young."

By Mr. Alioto:

Q. Incidentally, do you know who Young is?

A. Mr. Allen Young is buyer for the Safeway frozen foods company, whatever it's called. That isn't the name of it, but—

Q. Yes. And he was the Safeway representative who was negotiating with Mr. Dittman, was he?

A. That was his contact, yes, the Pet Milk Company.

• • • • • • •

[fol. 341] Mr. Alioto: "As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily remedied; and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves. The points you might use are: (1) Hot starch method instead of instant; (2) Slower freezing; (3) Lack of technical quality control personnel; (4) Storage of mixed fruit in 55-gallon non-stainless drums prior to being used; (5) Fruit mixture at too high temperature prior to use; (6) No covers on storage vessels or filler hopper; (7) No metal traps in lines; (8) No non-ferrous metal detector.

"Signed, Boyd."

By Mr. Alioto:

Q. At this time, Mr. Wohlhueter, the Pet Company had a national contract with the Safeway Company, did it not?

A. What's the date of that letter again?

Q. This letter is dated June of 1960.

A. Yes, sir, we did have.

• • • • • • •

Q. Okay. Mr. Wohlhueter, would you be good enough to tell this jury when it was that the Pet Milk Company went into the frozen pie business?

A. October 1, 1955.

[fol. 342] Q. And did you start from scratch, or did you acquire another organization?

A. Pet Milk Company purchased the Pet-Ritz—the Crystal Canning Company—on October 1, 1955.

• • • • • • • •

By Mr. Alioto:

Q. Mr. Wohlhueter, I believe that you said that the Pet Company acquired the Crystal Canning Company on October 1 of 1957?

A. '55.

Q. '55.

A. That is correct.

Q. And was this company also known as the Pet-Ritz Company?

A. It had recently bought the Pet-Ritz Company.

Q. All right.

George D. Wohlhueter resumed the stand and testified further as follows:

Mr. Alioto: This morning, if your Honor please, we were about to start discussing Plaintiff's Exhibit 39, which we marked for identification, and with defendants' counsel's stipulation of authenticity, I now offer it into evidence as plaintiff's exhibit next in order.

• • • • • • •

Mr. Billings: I want to make an objection to Exhibit 39 on behalf of Carnation.

Mr. Alioto: It is not being offered as against Carnation.

Mr. Billings: It is not.

Mr. Alioto: No. It is being offered at this point just against the Pet Company.

The Court: Received in evidence.

(The document marked Plaintiff's Exhibit 39 for identification was received in evidence.)

Direct examination (continued).

By Mr. Alioto:

Q. Mr. Wohlhueter, this exhibit is addressed to Miss Eunice Cox, Legal Department, St. Louis. Would you be good enough to identify Miss Eunice Cox for us?

A. She is an attorney in our Legal Department in St. Louis.

[fol. 343] Q. And her principal office is in St. Louis?

A. It is.

Q. She is directly employed by the Pet Company, and is not an outside attorney?

A. She is a company employee.

Q. And subject therefore to the control of the Pet organization?

A. She is.

Q. This letter was written from a Mr. Wilson Hall. I think you previously identified Mr. Hall as a sales representative in the West?

A. No, sir.

Q. How did you identify him?

A. He was sales manager for the Pet-Ritz Food Division of Pet Milk Company.

* * * * * * *

Q. Let me ask you, Mr. Wohlhueter, whether in connection with pricing your accounting division provides cer-

tain cost studies for the pricing agents, or for those who have responsibility for pricing?

A. Do we supply information for pricing?

Q. Yes, sir.

A. We provide what we call "Margin Studies," which shows what the return would be under a given price and given set of circumstances.

Q. And these margin studies are provided by your department to the pricing department?

A. That is correct.

Q. Are these done regularly?

A. Frequently.

Q. Frequently?

A. Yes, sir.

• • • • • • •

[fol. 344] By Mr. Alioto:

Q. Mr. Wohlhueter, the first Carnation zone is California, you will notice. Your first listed zone is also California. Now, would you be good enough to state out of what plant California is served by the Pet-Ritz Company?

• • • • • • •

A. The Fresno, California plant.

By Mr. Alioto:

Q. Now, where is the Carnation plant located?

A. I have no idea.

Q. Now, then, your second—the second zone of Carnation is Oregon, Washington, Utah, Idaho, Wyoming, Western Nebraska, Colorado, New Mexico, El Paso. Your second zone is Oregon, Washington, Oregon, Idaho, Utah, Western Nebraska, Colorado, New Mexico, El Paso, Texas.

Would you be good enough to state from which of your plants your second zone is served from?

A. I can't say about Western Nebraska or Colorado or any part of Texas. Those could be from either plant. But the others would be from the Fresno, California plant.

Q. Which of your plants is closer to Western Nebraska, for example?

A. Which is closer?

Q. Yes.

A. I don't know. I would have to have a map.

Q. Where are your plants located?

A. We have one in Frankfurt, Michigan and one in Fresno, California and one in Pennsylvania.

• • • • • • •

[fol. 345] Q. Now, it is a fact, is it not, Mr. Wohlhueter, that the chief executives of your company, the Pet-Ritz Company, meet with the chief executives of the Carnation Company at least four times a year in connection with the business of the General Milk Company?

Mr. Lamb: I object to the question.

A. No, sir.

The Court: Overruled.

• • • • • • •

[fol. 346] Mr. Schaefer: Your Honor, is it clear that none of this is offered as against the Morton Division?

Mr. Alioto: As of this time none of this is offered as against the Morton Division. It is being offered against the Pet Milk Company and the Carnation Company.

Mr. Schafer: And the last exhibit Mr. Alioto just read from, I take it, was not offered against the Morton Division.

Mr. Alioto: As of this time it was not offered against the Morton Division.

• • • • • • •

Mr. Alioto: Yes, I'll make that statement as soon as the other one is marked. 40 and 41. I offer at this time, if your Honor please, against the Pet Milk Company and the Carnation Milk Company Exhibit 40, which is a price list of the Pet Milk Company.

Mr. Lamb: I have no objection to that, your Honor.

The Court: Received in evidence.

Mr. Billings: I object as Carnation Company on the ground that it's irrelevant and immaterial.

The Court: The objection is overruled, and it's received in evidence.

[fol. 347] (The exhibit marked Plaintiff's Exhibit No. 40 for identification was received in evidence.)

* * * * * * *

Mr. Billings: May I look at it? I have no question about its authenticity, your Honor, but I object to it on the ground that it's incompetent, irrelevant, and immaterial, particularly as to the dates involved. Long before the plaintiff went into business here. And I don't see what relevancy or materiality it has to the alleged claim that this was a conspiracy to destroy the plaintiff, who wasn't even in the pie business at this time.

Mr. Alioto: This is identical pricing, if your Honor please, just before the period.

Mr. Billings: Almost a year prior to the time the plaintiff was in the business.

Mr. Alioto: That's correct. And the Continental Ore case said that in the Supreme Court that it was reversible error to exclude a period six years before the plaintiff got into business, any kind of business.

Mr. Lamb: If your Honor please, Mr. Alioto just said that these were identical prices, and when he read them to the jury, there were four of them that were not identical.

Mr. Alioto: Well, substantially—

Mr. Lamb: If this is characterizing—

Mr. Alioto: I will withdraw the word identical and say, "substantially identical," if you prefer that.

Mr. Lamb: Your Honor, I ask that this be stricken from the record, and I hope that you'll instruct the jury to ignore it.

The Court: Mr. Alioto has withdrawn the word, "identical," and has inserted in its place, "substantially identical," ladies and gentlemen.

[fol. 348] Mr. Billings: I object to that, your Honor. Either word. On the basis of—

Mr. Alioto: I'll withdraw all the words.

Mr. Billings: The documents speak for themselves, and the jury can determine whether or not they're identical or even substantially identical.

The Court: All right. Are you through making your objection, Mr. Billings?

Mr. Billings: Yes, your Honor.

The Court: It's overruled. It's received in evidence.

Mr. Schafer: Your Honor, may I state a different grounds?

Mr. Alioto: It's not offered against you.

The Court: I think the last observation Mr. Billings made was facetious and uncalled for at this stage of the game.

All right, what's your objection?

Mr. Schafer: It's not offered against me.

Mr. Alioto: That's right.

Mr. Schafer: As Mr. Alioto suggests. So maybe you don't want me to state my objection.

Mr. Alioto: If you want to make an objection, I'll offer it against you now. I'm not offering it against you.

The Court: All right. It's received in evidence.

Mr. Billings: Your Honor, may I inquire as to what claim was facetious on my part?

The Court: Do you want to argue with it?

Mr. Billings: No, your Honor. I just was—

The Court: It's overruled.

* * * * * * *

[fol. 349] By Mr. Alioto:

Q. * * * Now, it is a fact, is it not, Mr. Wohlhueter, that in connection with all of the work that you personally have done on 8-inch pies for this area, which are produced by the Utah Pie Company, that you set your prices so as not to make a reasonable profit, but you set them anticipating sales below cost? Isn't that a fact?

A. I don't set sales prices.

Q. Don't you prepare budgets?

A. Yes, sir.

Q. And forecasts?

A. Yes, sir.

Q. All right. Now, these budgets and forecasts set out a sales price, don't they?

A. Yes, sir.

Q. A prospective sales price. They set out the prospective cost—

A. Yes.

Q. —of doing business against that?

A. Yes.

Q. And then they set out a projected profit or loss against that, too?

A. Yes, sir.

Q. And you have done that work?

A. Yes, sir.

Q. And you've done it in connection with this area?

A. Salt Lake City division, yes.

Q. Yes. And it is a fact, is it not, that in all of the work that you have done relating to the Salt Lake City division that all of them projected losses rather than reasonable profits?

A. I believe that is a correct statement.

Q. Now, do you have any explanation or do you have any facts within your knowledge why you set a price list in relation to Carnation so as to make a reasonable profit, but when you set a price list where the Utah Pie Company is concerned, you set it so as to make a loss in that area?

A. I don't know what Paul had in mind—

Mr. Lamb: If your Honor please, I object to this.

Mr. Alioto: What's the objection?

Mr. Lamb: It's just argument to the jury.

The Court: I don't think so. The witness is getting along very nicely with these interrogatories. The objection is overruled.

Mr. Alioto: I think the answer was obscured in the objection.

By Mr. Alioto:

Q. Had you answered that question?
A. Could I have the question?

Mr. Alioto: Do you want to read the question to him, please. May the question be read, Judge, to the witness?

[fol. 350] (Question read.)

The Court: Do you follow the question?
The Witness: Yes, sir. It's two questions. First of all, I don't know what Mr. Hall had in mind when he wrote his letter. We attempt to make a profit every place when we set our selling prices. In relation to the Utah Pie Company, or the Salt Lake City area, I had nothing to do with the setting of the prices in this area. So I don't know how they were established.

By Mr. Alioto:

Q. Well, didn't you actually make up the budgets and forecasts which forecasted a loss for this area?
A. That is correct, I did. But I didn't set the selling price.
Q. Well, who gave you the figure of the selling price that you used in making your budgets and forecasts for this area?
A. Usually the sales manager.
Q. And who was that?
A. In this case—what year are you talking about?
Q. Well, in '58, '59, '60, and '61.
A. Well, that would either be Mr. Wilson Hall or Mr. John Bittner.
Q. Mr. Bittner. Now, Mr. Bittner, I take it, is presently in St. Louis, or he offices in St. Louis?
A. He is.

Q. Now, at the time he gives you the sales price and you prepare the study which shows a loss, do you then give that back to your sales manager so he knows that that price on the basis of your forecasts will result in a loss?

A. I give it to my general manager.

Q. Doesn't he give it to the sales manager?

A. They discuss it, yes.

Q. Therefore, before the prices are actually set, the sales manager has information from you that those prices in this area will result in a loss?

A. Could I clear up something?

Q. Surely.

A. I'm not sure whether you're talking about a margin study or a budget.

Q. Surely, Mr. Wohlhueter, you can clear up and say anything you want to on that subject.

A. Which are you talking about—

Q. First of all, what is your budget study as you have defined it? You state it in your own words.

A. Annually we prepare an estimate of our sales and our costs and our expenses and arrive at a projected profit or loss.

Q. Okay.

A. This is on an annual basis.

[fol. 351] Q. And you prepare that for frozen pies?

A. That is correct.

Q. And you prepare it for frozen pies in this area?

A. Until 1959 we prepared them on a division basis. After that we did it on a national basis.

Q. Now, until 1959, then, when you did it on a division basis, was one of those divisions the Salt Lake trading area?

A. It was, yes.

Q. Do you recall, sir, what states were included within that Salt Lake division?

A. I don't know, no, sir.

Q. And then after that it was done on a national basis?

A. That is correct.

Q. And this you call your budget—

A. Yes, sir.

Q. Budget-what?

A. Just our annual budget.

Q. Your annual budget. Now, then, you refer to another study as a margin study?

A. That is when we work with specific selling prices, as you have mentioned today.

Q. All right. Now, state for the record, Mr. Wohlhueter, in your own words what your margin study is and how you distinguish it from the budget study.

A. Well, margin study is an estimate based on a specific price for a specific product or a specific area. We make margin studies when we enter into a new product or when we make—change a selling price in an area.

Q. Now, both studies, however, show a projected profit or loss in connection with the distribution in the area, do they not?

A. Yes, sir.

Q. And in all of the budgets that you have prepared that relate to the Salt Lake division on 8-inch pies, those show that you expected losses or that you projected losses, did they not?

A. That is correct.

Q. Now, did you ever discuss these projected losses with your president, Mr. Gamble?

A. No, sir.

Q. Did you ever hear Mr. Gamble use the expression, "investment spending"? A. Yes, sir.

Q. Have you heard him use "investment spending" in connection with the losses you were prepared to suffer or that you projected for your frozen fruit pie business?

A. Yes, sir.

Q. Have you heard Mr. Gamble say in substance or effect that he was prepared to lose money in order to gain a position in the market?

A. Words substantially to that effect.

Q. And have you heard your president, Mr. Gamble, say that in relation to the Salt Lake City market on frozen fruit pies?

A. Not specifically, no.

Q. But he has said it generally with respect to all of your frozen fruit pie business?

A. Yes, sir.

[fol. 352] Q. And would you be good enough to state whether your president, Mr. Gamble, receives copies of these budget studies of yours and your Morton studies which disclose these projected or *prophecied* losses?

A. He does not receive the margin studies, no. He receives a consolidated budget when he reviews each division's budgets before they are approved by the board of directors.

Q. These budget studies you're speaking of which have forecasted losses on frozen fruit pies have then gone from you to Mr. Gamble, to the board of directors? Is that the way they go?

A. Not directly, no. From me to the general manager of our division.

Q. Yes?

A. At the present time this is Mr. Schenk.

Q. Mr. Schenk?

A. That's right.

Q. And then from Mr. Schenk to whom?

A. They would go to Mr. Gamble.

Q. The president?

A. The president of the company.

Q. And then to the board of directors?

A. Then to the board of directors, in a consolidated form, yes.

Q. Yes. And I take it, therefore, that all of those gentlemen have been in on the approval of any budgets in relation to frozen fruit pies which in fact projected losses?

A. That is correct.

* * * * * * *

Q. State whether or not there is a contract to your knowledge between the Safeway Company and the Pet Milk Company for the production of Bel Air pies, the Safeway private label.

A. I'm sure there is. I have never seen it, but I am sure there is.

Q. Have you ever done any work in connection with the costs or cost justification?

A. Yes, sir, I have.

• • • • • • • •

By Mr. Alioto:

Q. Now then, with respect to this pricing, we have the pricing $3.16 from Fresno and $3.24 from these other plants. I want to call your attention to a list or a Chart 1 which is attached to a letter transmitting that contract and ask you if you will be good enough to state for the record—examine it first—and then state generally what it shows. Just a generic description of it, or a description of it.

A. Price differences between Pet-Ritz pies in full truck quantities and Bel Air pies as of January 1, 1960.

Q. These price differences between Pet-Ritz pies, full trucks, and Bel Air pies. Now, I take it that the prices [fol. 353] listed here, particularly those listed under Utah, are the prices both for the Pet-Ritz and for Bel Air in this area; is that correct?

A. Yes, sir.

Q. And on what kind of a basis are these pies? On a per dozen basis, or on a case basis?

A. Per case basis.

Q. Now, would you be good enough to look at the prices as they're set out for Salt Lake City? You notice your Pet-Ritz price for Salt Lake City?

A. $2.16.

Q. And would you be good enough to give me your prices for San Francisco or Los Angeles?

A. $2.32.

Q. Now, this means, does it not, Mr. Wohlhueter, that as of this time—that is, the prices in 1960—that a purchaser located at your plant in Fresno, California would pay $2.32 for a case, and a purchaser in Salt Lake City would pay 16 cents per case less? Is that correct?

Mr. Lamb: If your Honor please, may I ask whether or not this $2.16 and $2.32 price is a Bel Air pie or a Pet-Ritz pie? Which is it?

Mr. Alioto: This is a Pet-Ritz pie.

Mr. Lamb: Your Honor, I think it should be designated, then, because the caption over there is "Bel Air."

Mr. Alioto: I'm talking just about the Pet-Ritz pie, nothing else.

By Mr. Alioto:

Q. It is a fact, is it not, that at the time you made this contract, to get this part of it out first, and the prices you quoted in this contract when you set those prices out for the customer, that you showed that a purchaser at your plant in Fresno would buy your Pet-Ritz pie for $2.16 a case, and a purchaser in Salt Lake City at the same time would buy the same pie at $2.32 a case?

A. That's what that schedule shows.

Q. That's correct, is it not?

A. That's what that schedule says.

Q. So that would be a differential of 32 cents a dozen between the man who buys a pie at your plant door in Fresno and the man who buys your pie in Salt Lake City, the very same pie?

A. According to that price list, yes.

Q. You have no reason to believe that these prices that you set out in the Safeway contract are not correct prices, do you?

A. I don't know whether they're right, or not. I assume they are, but I don't know. I haven't checked them.

[fol. 354] Q. All right. Now, do you know, as the controller of the company, what reason existed for setting out

a price of 32 cents a dozen more in Salt Lake City for the same price than a customer would pay at your plant door in Fresno, California?

A. No, sir.

Q. You don't know of any reason?

A. I know of no reason.

Mr. Alioto: Now, I think that what we have said about apple applies also to cherry. I'd just like to read to the jury from this exhibit in evidence, if your Honor please.

The Court: Yes.

Mr. Alioto: The prices in Los Angeles, San Francisco, Sacramento, as against the Salt Lake prices, the El Paso, Denver, Salt Lake City, Butte, Portland, Seattle, Spokane prices. On apple pie it's $2.32 in Los Angeles and San Francisco; $2.16 for the same pie in Salt Lake City. On cherry pie it's $2.34 per case in Los Angeles and San Francisco; and $2.16 in the Salt Lake City trading area. On boysenberry pie, this price list is $2.44 in San Francisco, Los Angeles; and $2.44 for the Salt Lake City trading area.

By Mr. Alioto:

Q. Now, I asked you if you knew of any reason why apple pies sold for less in Salt Lake City than they did at the plant there in Fresno. I ask you if you know of any reason now why cherry pies sold for $2.16 in Salt Lake City as against $2.44 by the plant door?

A. No, sir.

Q. Now, in connection with this—

Mr. Lamb: Your Honor, I'm confused on this matter, I don't know—

Mr. Alioto: Well, you wait for the argument in end, and maybe we'll clear up your confusion, Mr. Lamb.

Mr. Lamb: Well, at one time Mr. Alioto was referring to the $2.32 price as a Salt Lake City price, and the next

time he referred to it as a San Francisco price. And I think the record will show that.

Mr. Alioto: Well, then I'll clear that up, if that is the situation, Mr. Lamb. I want to make it perfectly clear that the low leg of the price was in Salt Lake City, and the high leg of it was at the plant door in California; that it [fol. 355] cost more in California. And so the record does show that $2.32 price in Los Angeles, and the lower price, $2.16 in Salt Lake City.

By Mr. Alioto:

Q. Now, then, in connection with this contract, would you be good enough to state whether or not the Bel Air pie is substantially the same as the Pet-Ritz pie?

A. It is substantially the same product.

Q. All right. Now, your Pet-Ritz pie—let's take Salt Lake first—your Pet-Ritz pie in Salt Lake sold for $2.16, and your Bel Air for $1.65?

A. Yes, that is correct.

Q. That's a difference of 51 cents?

A. That is correct.

Q. Now, those two pies in San Francisco are by the plant door sold for a 67 cent differential; is that correct?

A. That is correct.

Q. Now, would you be good enough to tell us what makes up that differential between the $1.65 price to Safeway for Bel Air and the $2.16 price to your general customers for Pet-Ritz?

A. I don't know, sir.

Q. Well, do you have any cost justification study with you?

A. I have one on the most recent full year, yes, sir.

Q. Would you be good enough to hand me the document that you do have in connection with cost justification?

Mr. Lamb: Your Honor, in order to prevent confusion, may the record show that the document that's being handed

to Mr. Alioto is a cost justification study, made for 1961-62; and the prices that Mr. Alioto is referring to here are 1960 prices. So there can be some confusion. Now, as far as the method of cost justification, if Mr. Alioto is going to address himself to that, I assume that the same method was used, but the figures might be slightly different.

Mr. Alioto: We'll offer this in evidence, if your Honor please.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 43 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, do you have in your briefcase any other studies or documents or compilations which relate in any way to a cost justification as between these two prices?

A. I have here the supporting papers on that one.

[fol. 356] Q. Now, when you say that one, you mean Exhibit 43?

A. Exhibit 43.

Mr. Alioto: Thank you. We'll ask these be marked, if your Honor please.

Mr. Lamb: May I have an examination on voir dire?

The Court: Yes.

Voir dire examination.

By Mr. Lamb:

Q. Mr. Wohlhueter, this last document just before Mr. Alioto asked for it to be marked for identification, you said it was a supporting document. Now, what's that?

A. The figures on this schedule are carried forward to that typed sheet.

Q. In other words, these figures would be identical with what's on the typed sheet?

A. No, sir, there are more here. They show how they arrived at the figures here that were carried forward to that sheet.

Q. Will these foundation documents be sufficient to explain any of the questions that Mr. Alioto may wish to ask of you on cost justification, or do you have some other documents in St. Louis?

A. This is all I have here. We don't have our standard cost cards, nor can the actual dollars per case be justified in this office, or supported here in Salt Lake City. We have one in St. Louis.

Mr. Alioto: We'll ask this document be marked, if your Honor please, as our next exhibit in evidence.

Mr. Lamb: If your Honor please, I ask that this document be given the same confidential treatment that's already been ruled.

The Court: Yes. Received in evidence, and we'll do that.

(The exhibit marked Plaintiff's Exhibit No. 44 for identification was received in evidence.)

By Mr. Alioto:

Q. Mr. Wohlhueter, what other documents do you have in your briefcase that relate to costs, or to profits, or in any manner to the accounting of the Pet Milk Company?

• • • • • • • •

[fol. 357] Mr. Alioto: What I'm asking the witness is what he has in the suitcase that relates in any way to profits, losses, or costs of the Pet Milk Company. This is the subject about which I'm inquiring.

Mr. Lamb: If your Honor please, in the course of the development of this case, the plaintiff's counsel served upon us many subpoenas and interrogatories—

The Court: Sure.

Mr. Lamb: And we answered all of them. We furnished nine executives to take depositions. We gave him 700 docu-

ments. And now he's still trying to find some more documents.

The Court: Nothing wrong with that. As long as this lawsuit is going on, he can ask for what he's got that he thinks might be useful to him.

• • • • • • •

[fol. 358] By Mr. Alioto:

Q. Do you have the question in mind, Mr. Wohlhueter?

A. Yes, sir.

Q. What documents do you have that relate in any way to profits, losses, or costs of the Pet Milk Company for the years—any year between 1958 and 1961?

A. I have several files here, but I'm not sure they will be in relation to those particular questions.

Q. Well, you describe what those files relate to.

A. Private label justification file.

Q. Fine. May I have that private label justification file?

• • • • • • •

[fol. 359] Q. Mr. Wohlhueter, at the session before this time, you will recall that we discussed the matter of margin studies and budgets.

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 7. Would you be good enough to take a look at that and state whether or not that file contains the budgets for Salt Lake City for the years 1958 and 1959? Or, rather than check the dates, just tell us generally whether or not these studies set out in Plaintiff's Exhibit 7 are budget studies as you have previously described them.

A. Yes, sir, they are comparison between the actual results and the budgets. I am not sure about the Salt Lake Division. I can't see that in here.

Mr. Alioto: All right. I think counsel will stipulate that these are for the Salt Lake Division, as well as for other divisions, for the years 1958 and 1959.

Mr. Lamb: I'd be happy to stipulate, subject to check.

Mr. Alioto: All right. We'll offer these in evidence, if your Honor please, as the plaintiff's exhibit next in order.

The Court: Received.

[fol. 360] (The exhibit marked Plaintiff's Exhibit No. 7 for identification was received in evidence.)

Mr. Alioto: We'll offer with them, if your Honor please, Exhibits 7(a) and 7(b), which are compilations on a month by month basis made by plaintiff's accountants. A copy has been checked by Mr. Lamb. I understand he'll be good enough to stipulate that subject to check. They may go in.

Mr. Lamb: That's correct, your Honor.

The Court: Received.

(The exhibits marked Plaintiff's Exhibits No. 7(a) and 7(b) for identification were received in evidence.)

Mr. Alioto: Seven was the basic documents. 7(a) is the compilation from that basic document for 1958; and 7(b) is a compilation from that basic document for 1959. 7(a) and 7(b) cover the Salt Lake Division only.

Ladies and gentlemen, these are the Pet Milk Company Salt Lake Sales Division actual and budgeted pre-tax losses on fruit pie sales for 1958.

By Mr. Alioto:

Q. Actual and budgeted, so far as the words are concerned, Mr. Wohlhueter—budget is what you have set up in advance of the sales; is that correct?

A. That is correct.

Q. And then "actual" is the result achieved after the sales?

A. That is correct.

Q. Now, are they budgeted so far as the month is concerned? Do you know whether or not they are made up for the entire year in advance, or are those budgets revised in the light of the last month's experience or any other prior period?

A. No, sir, they're made up annual for the full twelve months ahead.

Q. For the full twelve months?

A. Yes, sir.

• • • • • • •

[fol. 361] By Mr. Alioto:

Q. Now, the Salt Lake City Sales Division that we're speaking of, Mr. Wohlhueter, covers the Salt Lake City trading area, does it not?

A. Quite a large geographical area. I think it's the entire Intermountain Area, but I can't define it to you. It includes Salt Lake City.

• • • • • • •

[fol. 362] By Mr. Alioto:

Q. Now, at the last session, Mr. Wohlhueter, we were speaking about the Safeway contract. I show you what has been marked Plaintiff's Exhibit 46 for identification, which was taken from that folder of materials which you handed us last time. That folder of materials was marked 145 for identification, I believe—or 45, for identification.

Would you be good enough to look at that document, please, and then identify, if you would, the person who wrote it. I think you will see his initials on the third page. Whose initials are those which appear on the third page?

A. Apparently they are Mr. Bitner's, John Bitner. I think his middle initial is "R". The initials here are JRB.

Q. John R. Bitner?

A. Right.

Q. And Mr. Bitner you identified, I believe, as your sales manager?

A. He is presently our sales manager.

Q. What position did he hold in 1959, if you recall?

A. He was either frozen foods product manager or the assistant to the frozen foods product manager.

Q. In any event, he was one of the persons in the Pet organization who negotiated the Safeway contract, or who participated in the negotiation of the Safeway contract.

A. I don't think Mr. Bitner ever did, no, sir.

Mr. Alioto: We will offer this in evidence, if your Honor please, as plaintiff's exhibit next in order, and suggest it not be read at this time, but we would like to comment on certain features of it in the argument to the jury.

Mr. Lamb: No objection.

The Court: Received.

(The document marked Plaintiff's Exhibit No. 46 for identification was received in evidence.)

By Mr. Alioto:

Q. I show you another document taken from your folder, the folder which has been marked 45 in evidence. This [fol. 363] document has been taken from it. It is now marked 47 for identification. Would you be good enough to take a look at it and see if you can help us to identify the writer. The first paragraph, you will note, simply reads: "The following points were covered and agreed on in a discussion with Safeway in the office of Allen Young between Boyd Schenk and me."

Now, to begin with, Allen Young, of course, is the Safeway buyer?

A. That is correct.

Q. Boyd Schenk you have already identified as the present head of your Frozen Foods Division?

A. That is correct.

Q. Then it goes on to say, "and me." Is there anything in that letter that would help you to identify the person who wrote that letter?

A. No, sir. I had a photostat copy of this over the weekend, as you know, and I still don't know who "me" is.

Q. Okay.

A. I was not in the division at that time.

Q. But Boyd Schenk, the person who was present in the office, is the present head of the Frozen Foods Division?

A. He is, yes.

Q. Do you know what position he held in or about July, 1959?

A. He was production manager for the Frozen Foods Division.

Mr. Alioto: We will offer this in evidence, if your Honor please, as the plaintiff's exhibit next in order.

The Court: Any objection?

Mr. Lamb: No objection.

Mr. Schafer: I wonder if I am correct in understanding that counsel is not offering these documents against Morton?

Mr. Alioto: You are correct. At the present time the document is being offered against the Pet Company.

Mr. Schafer: All of these documents, I meant, is that correct?

Mr. Alioto: That is correct.

The Court: Received.

(The document marked Plaintiff's Exhibit No. 47 for identification was received in evidence.)

* * * * * * *

[fol. 369] Mr. Alioto: We will offer this in evidence, if your Honor please, as Plaintiff's Exhibit 48.

By Mr. Alioto:

Q. This is entitled, Mr. Wohlhueter, "Management Letter, April 24 through May 29," with a carbon copy to S. P. Harter. Would you be good enough to identify Mr. Harter?

A. Mr. Harter is our senior vice-president.

Q. Do you know the nature of "Management Letter," what that means?

A. I can't say. I understand our sales personnel prepare periodic reports, and I would assume that that is what it is.

Q. To the Management?

A. Yes, to their superiors.

Q. Those portions we have—a portion is blacked out—Item B reads:

"New distribution was gained on our Pineapple and Apricot 8-inch pies in Beatrice, Kings Soopers, H. A. Marr and Safeway, in Denver.

"All jobbers in Salt Lake City, Pocatello and Boise, have taken on our new flavors, that is, Apricot and Pineapple, in the 8-inch size.

"H. A. Marr, Beatrice in Denver, have taken on our 9-inch pies, all flavors.

"Union Ice and Cold Storage and Farmers Exchange, in Reno, as well as Utah Wholesale in Pocatello, have taken on our new 9-inch pies.

"Special features have been given us regularly from most of the key chains and groups throughout our Division. The jobbers in Denver, Spokane and Boise have been faithful in their support for us, but in Salt Lake, there has been no loyalty established.

[fol. 370] "C. Unfavorable Factors Affecting Results.

"Continued featuring of cut price pies in Salt Lake—Ogden areas, (Morton's, Libby's and Utah), has hindered our growth in this area.

"In the Spokane market, we have been unable, as yet, to get new flavors moving. Purchases of cream pies have tied up freezer space. The interest in our 9-inch pies has been anything but encouraging.

"Morton's 22 ounce pie is being handled by every major distributor in Denver. First one account, then another will feature Morton's 22 ounce pie. It has been advertised as low as 15¢ per pie. After this special price is off, according to all reports, we resume our position in the freezer cabinet as the *principle* pie. We have been able to, in most cases, get counter features. Competition in the Spokane area has been inactive."

I will offer at this time, if your Honor please, the inter-office memorandum marked "Personal," Plaintiff's Exhibit 49.

Mr. Schafer: Your Honor, may I comment with respect to Exhibit 48. Do I understand it is not being offered as against Morton?

Mr. Alioto: As of this time it is not, that is correct, as I have indicated.

By Mr. Alioto:

Q. Mr. Wohlhueter, I know that this next one is very difficult to read, but at the top there is a man's name, which is A. H. Coleman. Would you be good enough to identify who Mr. Coleman is in your organization?

A. At this time I would have assumed he would have been the national sales manager, sales manager for the Milk Products Division.

Q. He's national sales manager for the whole country?

A. Yes, sir. For Milk Products Division.

Q. Now, the next line says, "E. J. Nord."

A. That's the same offer as the previous one.

Q. What was his position so far as the Salt Lake City Division was concerned?

A. Sales manager for Salt Lake City.

Q. So that this, then, is the sales manager of the Salt Lake City Division to the national sales manager?

A. That is correct.

• • • • • • •

[fol. 371] Mr. Lamb: Yes.

Mr. Alioto: We'll offer it in evidence.

The Court: Received.

Mr. Lamb: No objection, your Honor.

(The exhibit marked Plaintiff's Exhibit No. 49 for identification was received in evidence.)

Mr. Alioto: This letter, your Honor, is dated February 11, of 1960. It's to Mr. Coleman, the national sales man-

ager, from Mr. Nord of Salt Lake City, division sales manager, and it's marked, "Personal."

"I know I sounded quite disappointed when you told me we weren't going to meet Simple Simon's deal all the way in Utah."

By Mr. Alioto:

Q. Now, Mr. Wohlhueter, would you be good enough to identify Simple Simon? What company is that?

A. It's the pie manufactured by the Carnation Milk Company.

Q. That's the Carnation Company.

• • • • • • •

[fol. 372] By Mr. Alioto:

Q. In any event, Mr. Coleman was Mr. Nord's superior, was he not?

A. Yes.

Mr. Alioto: Now, this letter reads as follows, marked "Personal":

"I know I sounded quite disappointed when you told me we weren't going to meet Simple Simon's deal all the way in Utah. I can assure you that this feeling will not be passed on to Bennion or any of our men when it is handled with them. And we will do everything within our power, using the techniques you suggested, and some of our own, to retain our position in the market. I have already talked with Bennion on this, and he has accepted it. And after our talk he was even enthusiastic and feels we are doing the right thing. We will keep you posted as to what the situation is in the Utah market. If you want to know the truth, we are darn glad to have the deal we had in Montana and Idaho. I've got my lip off the floor again now, and we are cooking for gas. See you next week."

[fol. 373] By Mr. Alioto:

Q. Mr. Wohlhueter, do you know who the "Bennion" is referred to in this letter?

A. I have no idea.

Mr. Lamb: Your Honor, I'd like to have you instruct the witness not to guess on any of these names, if he has any doubt about it at all.

Mr. Alioto: He hasn't guessed.

The Court: I will tell him that. We don't want you to speculate about it. If you know, why, let us have the benefit of your knowledge.

Mr. Alioto: We offer next, if your Honor please, Plaintiff's Exhibit 50 in evidence, which is your document 139. And if you have it, I'd appreciate some help on the date. It's very, very difficult to read on this one. But it's written to a Mr. J. A. Dodge from A. N. Coleman, entitled, "Simple Simon Price Decline, Utah."

By Mr. Alioto:

Q. Would you be good enough to tell us again whether or not Mr. Dodge is connected with the Pet Milk Company?

A. Yes.

Q. And, of course, Mr. Coleman is?

A. Yes.

Mr. Alioto: We'll offer it in evidence, if your Honor please. The best we can do on the date is to indicate it's in 1960; and by later on collating it with the prior document, I think we can fix the date more exactly. But it's offered into evidence.

The Court: Received.

Mr. Lamb: No objection.

(The exhibit marked Plaintiff's Exhibit No. 50 for identification was received in evidence.)

Mr. Alioto: This reads, ladies and gentlemen;

"J. A. Dodge, A. M. Coleman. Simple Simon Price Decline, Utah."

By Mr. Alioto:

Q. Simple Simon, is not the Pet pie, but the Carnation pie, isn't it?

A. That's correct.

[fol. 374] Mr. Alioto: "We were advised that Simple Simon has extended the Idaho price decline into the State of Utah. You may recall this is a 21 cent temporary price decline on all flavors with a 30-day floor stock protection.

"The product did not feel they could, or that it was advisable, to meet the Idaho Simple Simon decline; so in view of this, we do not recommend we meet the situation that has now developed in Utah at this time.

"I have asked Nord to keep me well informed as to what happened in the way of distribution loss, as well as any possible drop in volume; and if it appears we are being hurt drastically, we'll advise and make recommendations as to what we think should be done."

By Mr. Alioto:

Q. Now, Wohlhueter, have you ever heard any discussion in your organization in connection with the preparations of budgets as to why in this period of time in 1960 your organization was not meeting the Carnation price decline?

A. No, sir.

Mr. Alioto: We offer this next, if your Honor please—

Mr. Lamb: Your Honor, I've discovered the date on that document. It's March 4, 1960.

Mr. Alioto: May I write it in?

Mr. Lamb: I have no objection.

Mr. Alioto: Thank you. This is very difficult to read. And the prior letter, you recall, is February 11.

Offer next Plaintiff's Exhibit 51 in evidence. I think this is an interoffice memorandum in the Pet Company, ad-

dressed to Mr. Coleman from D. J. Nord. Both gentlemen have already been identified. It relates to the Simple Simon deal, Utah. The date appears to be March 7, 1960. We'll offer it.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 51 for identification was received in evidence.)

[fol. 375] Mr. Alioto: This reads as follows:

"A. W. Coleman to D. J. Nord. Simple Simon Deal, Utah. As reported to you on the telephone, Simple Simon has extended their 21 cent per case temporary decline offer into the Utah marketing area. It is effective February 27 through March 31, 1960. In addition to the temporary decline, they of course, still have their 15 cent per case special retail advertising allowance, which is in effect until March 18."

We'll offer next—

Mr. Lamb: No objection.

Mr. Alioto: We'll offer next, if your Honor please, Plaintiff's Exhibit 52.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 52 for identification was received in evidence.)

Mr. Alioto: Plaintiff's Exhibit 52 is an interoffice memorandum from D. R. Davis to Gordon Billig.

By Mr. Alioto:

Q. Is there a man named Billig in your office?

A. I'm not aware of it.

Q. Can you read this? Oh, no. Gordon Ellis. Do you know Mr. Ellis?

A. I do.

Q. And what position does he occupy in the Pet organization?

A. At the present time he's general vice president and general manager of the Pet Milk Company.

Q. Vice president and general manager?

A. That is correct.

Q. And who is Mr. D. R. Davis?

A. He's in our sales organization. I can't tell you what capacity at that time.

Mr. Alioto: This is an interoffice memorandum dated June 21, 1960.

"Pet Fruit Pie Pricing and Allowances, Western United States, Western Region, California, Reno, Nevada, and Arizona. 1. Simple Simon and Pet-Ritz net prices on fruit pies in this area are the same, with one exception. We have accomplished this with allowances of 8-inch apple, 23 cents, cherry, 44 cents, peach, 32 cents, boysenberry, 44 cents. [fol. 376] The exception is on pineapple flavor, where we are 12 cents per case higher in price. Most recent competitive deals on Simple Simon and Pet-Ritz expired June 17, and no deals have been uncovered.

"2. Both Simple Simon and Pet-Ritz extend a 5 cent storage and handling allowance to customers in southern California.

"3. Morton's price on 22-ounce apple, peach, cherry, boysenberry, and coconut custard in this area is $3.65 in full trucks. Various deals are rumored, but none proven currently.

"4. County Fair has a 12 cent per case ad 80 allowance during the month of June on 8-inch apple, 8-inch boysenberry, and 8-inch peach. County Fair is 20 cents per case higher in price on these flavors than Simple Simon or Pet-Ritz.

"Balance of Western Region."

By Mr. Alioto:

Q. Do you know whether or not the balance of the Western Region, as distinguished from the Western Region, which includes California, Reno, Nevada, and Arizona, do

you know whether or not the balance of the Western Region includes Salt Lake City?

A. I do not, sir.

Mr. Alioto: "Simple Simon and Pet-Ritz fruit pies are at equal prices except in Salt Lake marketing area, where Simple Simon has 21 cents per case allowance June 1 until further notice on apple, peach, cherry and crust top lemon. Buell has confirmed this with customers.

"2. Johnson has 25 cents per case on all flavors in Oregon. This also has been confirmed by customers.

"3. Again in this area, rumors persist of Morton deals, but no proof can be obtained.

"West Central Region."

By Mr. Alioto:

Q. Do you know where that is? West Central Region?

A. I can't describe it geographically, no.

Q. Do you know generally what area of the United States that encompasses so far as the Pet organization is concerned?

A. It used to conform to our—pretty well conforms to our Kansas City region.

[fol. 377] Mr. Alioto: Kansas City region.

"Simple Simon and Pet-Ritz basic net prices on fruit pies are the same in this area except pineapple. On this flavor we are priced 28 cents per case higher than Simple Simon. We do not have current information regarding Morton and Simple Simon activity in this area, but should be in a position to supply it later this week."

We'll offer next, if your Honor please, interoffice memorandum dated August 5, 1960, from Mr. D. J. Nord entitled, "Management Report, Food Products Division, Field Sales, Salt Lake District." We'll offer this in evidence.

Mr. Lamb: No objection.

The Court: It's received.

(The exhibit marked Plaintiff's Exhibit No. 53 for identification was received in evidence.)

Mr. Alioto: This is the July Management Letter of 1960. Johnston in Spokane—

By Mr. Alioto:

Q. Johnston is another competitive pie?
A. That's correct.

Mr. Alioto: "Johnston in Spokane, through underhanded tactics by their broker, have gained distribution in Albertson's, Low Cost, and other key independents. This has all been at our expense, since Simple Simon is no factor in the market. A special letter covering this has been sent to the region office.

"Simple Simon reduced cream pie prices 51 cents in Utah and Idaho. A price list will be sent under separate cover."

• • • • • • •

[fol. 378] Mr. Alioto: We'll offer in evidence, if your Honor please, Plaintiff's Exhibit 54 for identification, which is a letter dated September 6, 1960. It's a Pet interoffice memorandum attaching a Carnation letter to the trade. We'll offer this into evidence.

Mr. Billings: May I see it?

Mr. Alioto: Surely.

Mr. Billings: Are you offering that against Carnation, or just against Pet at this time?

Mr. Alioto: The Pet letter at this time is being offered against Pet. The Carnation enclosure, of course, is being offered against Carnation, as well as Pet.

Mr. Billings: With that clarification I have no objection.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 54 for identification was received in evidence.)

Mr. Alioto: This is Plaintiff's Exhibit No. 54, going forward in date, now, to September of 1960. Mr. John Bittner from D. J. Nord. The subject is, "Competition on Frozen Pies."

By Mr. Alioto:

Q. Mr. Wohlhueter, before we start in, would you be good enough to identify the Sego Milk Products Company? [fol. 379] A. This is a subsidiary company of the Pet Milk Company.

Q. This is a Pet interoffice memorandum, even though it has, "Sego Milk Products," on it; is that correct?

A. That is correct.

Mr. Alioto: "Listed below are prices in effect in the Salt Lake Division on Simple Simon pies. Morton and Banquet are not in either the Salt Lake or Spokane markets.

"Spokane area. Simple Simon creams, $2.50, full truck. Simple Simon fruit, $2.18, full truck. Same as ours. No deals on at present.

"Salt Lake area. Simple Simon, apple, cherry, peach, boysenberry, $2.06.

"Attached is a letter from Carnation Company to the trade for your information. D. J. Nord."

The attached letter from the Carnation Company reads as follows—

Mr. Billings: Would you give the date of that?

Mr. Alioto: July 23, 1960. This interoffice is September 6, 1960, and the Carnation letter is July 23.

"To our customers. Subject: Price Decline on Simple Simon cream pies. Effective opening of business Monday, July 25, 1960, Carnation Company announces the following price decline of 28 cents per case on all flavors of Simple Simon cream pies. The following lists your new prices."

Then follow a listing of prices.

"In addition to the above, there will be a special allowance of 23 cents per case off the face of the invoice, effective Mon-

day, July 25, 1960. This will bring your total floor stock protection to 51 cents per case on stock on hand as of July 25, 1960, and purchased since June 25, 1960.

"Enclosed herewith is our rebate form. Do not deduct rebate from your invoice remittances. All rebates will be paid by check from our Los Angeles office. Please fill in the necessary information on the form, sign in the place indicated, and return to us as soon as possible.

[fol. 380] "This price decline and deal comes at the peak season for cream pies. I am sure it will result in some plus volume for you and your accounts."

If your Honor please, offer next a document dated April 7, 1961, an interoffice memorandum to the Pet organization. It has been marked Exhibit 55.

Mr. Lamb: No objection.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 55 for identification was received in evidence.)

By Mr. Alioto:

Q. Will you identify the signature that's written, hand written, on document 55 in evidence?

A. No, sir, I can't.

Q. Do you see this handwritten note, "John will explain—"

A. Do you want me to interpret what—

Q. No. Who is "John" involved here?

A. John would be probably Mr. Davis's superior, John Bittner.

Q. John Bittner, the sales manager. All right, now. Mr. Davis was associated with sales, I take it?

A. That is correct.

Q. Would you be good enough to identify Mr. L. D. Umlauf? That's spelled U-m-l-a-u-f.

A. He's also in our sales organization.

Mr. Alioto: The subject matter of this interoffice memorandum is, "Utah and southern Idaho."

"As you know, we received incorrect information concerning Simple Simon activities in Utah and southern Idaho upon which we based our recent Pet-Ritz deal, which is 20 cents per case TPD on apple, cherry, peach, boysenberry. In addition, we have 20 cents per case special ad allowance on apple, cherry, peach, and boysenberry. Both deals run from March 13 through April 15, 1961."

By Mr. Alioto:

Q. Mr. Wohlhueter, would you be good enough to explain what the letters, "TPD" mean, the capital letters?

A. I have no idea.

Mr. Alioto: "We now find Carnation has in effect a TPD on Simple Simon apple, cherry, top crust lemon, peach, custard, which is on an indefinite time period with no stop- [fol. 381] ping dates. These prices are being reflected in price lists such as the attached from Associated Frozen Foods. No doubt Simple Simon is doing this to compete against Utah and Frost 'N' Flame. Nord now recommends we reduce our price so that we appear competitive with other prices, as has Simple Simon. He feels our deal should be on an indefinite TPD of 45 cents per case on apple, cherry, peach, custard, until further notice. Recognizing our position in the Salt Lake market and the problems with Albertson's and Grand Central, to mention a few, I must say I agree with Nord. This agreement is predicated upon whether or not we feel the Utah market is important enough to us that we want to reestablish distribution, which I am sure we both feel is necessary.

"Would appreciate your views. Regards."

And then in pencil is a signature—there's some writing that's difficult to make out. "How much?" is written opposite the second paragraph. And then: "John will explain, or we called to him."

By Mr. Alioto:

Q. That John, you say, was John Bittner, the salesman?
A. I assume that is who it is, yes, sir.

Mr. Lamb: If your Honor please, will you instruct the witness again not to guess on these names?

Mr. Alioto: Well, let me put it this way—

Mr. Lamb: If he knows and has any personal knowledge, he can answer; but he's not in the sales department. He's been a comptroller. He's been in the financial end of the company; and unless it's just by happenstance, he doesn't know this.

The Court: Well, he knows quite a lot about it. He's telling us a lot about it. But I heard him say he assumes this is so. Now, just tell us, if you know, Mr. Wohlhueter.

The Witness: I can't tell who John is, no, sir.

The Court: All right.

• • • • • • •

[fol. 382] Mr. Billings: Very well. Secondly, your Honor, this, again, is two pages out of the minutes of the frozen food committee of the Carnation Company. You remember that one page was offered before, and I will object to the introduction of just two pages out of the entire minutes, unless the entire minutes, which have been made available to the plaintiff, are offered, so that they can be seen in context, not taken out of context. The author of the minutes, as Mr. Alioto knows, is dead, and there's no basis for explanation of these unless these minutes are taken as a whole.

• • • • • • • •

[fol. 383] The Court: The objection is overruled.

Mr. Lamb: Your Honor, I object to the introduction of Plaintiff's Exhibit No. 56 as against the Pet Milk Company, in that it is a Carnation document, taken from the Carnation files, and unless connected in some way to the Pet Milk Company, is irrelevant.

Mr. Alioto: Well, I think as of this time we are offering it against the Carnation Company, except that we offer it

generally for the objective fact that a Carnation man made an announcement on January 5 of 1961 about what Pet was going to do, or what they had already done.

Mr. Lamb: Your Honor, I object to that. That's characterizing the document in front of the jury.

Mr. Alioto: I'm going to read it into evidence now.

Mr. Lamb: But the characterization, your Honor, I object to very severely. This is an attempt to show that Carnation and the Pet Company were operating simultaneously; and this document does not say that. That's a pure characterization.

Mr. Alioto: All right. We'll offer it in evidence, if your Honor please.

The Court: The characterization is stricken. We'll receive it in evidence.

[fol. 384] (The exhibits marked Plaintiff's Exhibit No. 56 and 57 for identification were received in evidence.)

Mr. Alioto: On January 5 of 1961, the Carnation minute reads as follows:

"Murphy presented deals 7 and 8 for the period February 13 through March 17 and explained that since the proposal was developed, Pet-Ritz had announced a January deal of one case of apple free with ten, to be followed by a deal of 30 cents per case off the face on cherry in February."

That's as much as I want to read of this minute. And then—

Mr. Billings: Well, let's read the whole minute.

Mr. Alioto: Okay. Now, if your Honor please—it's all detailed—

The Court: You do whatever you want, Mr. Alioto. You don't have to read the whole minute. If there's something else they want to read, they can have an opportunity to do it. Sometime when we get around to that.

Mr. Billings: It would seem to me, your Honor, that it's taking the matter out of context, the same—

The Court: The objection is overruled.

Mr. Alioto: That's dated January 5, of 1961. The next document is a Pet document from the sales service department to the Denver, Dallas, St. Louis, and Kansas City division managers, with a carbon copy to the West Central Region office. It's dated January 24, 1961.

"Subject: Pet-Ritz Promotional Bulletin and Retail Special Merchandising agreement 30 cents per dozen special advertising allowance on Pet-Ritz 8-inch apple and cherry pies.

"Under separate cover we are sending you a quantity of the attached Pet-Ritz promotional bulletin and retail special merchandising agreements outlining a 30 cent per dozen special merchandising allowance on Pet-Ritz 8-inch apple and cherry pies. This special merchandising allowance is effective January 23, 1961, through February 18, 1961, in the following areas:"

[fol. 385] Then it lists a group of areas, and concludes:

"Please distribute to all interested salesmen and customers."

And then the form for this retailers special merchandising agreement is attached.

Mr. Alioto: We will offer next, if your Honor please, Plaintiff's Exhibit 58.

• • • • • • •

Mr. Alioto: This, if your Honor please, is 57. The Carnation letter was 56, and the Pet letter is 57.

The Court: Do you have any objection.

Mr. Lamb: No objection.

The Court: Received.

Mr. Alioto: Thank you, Mr. Lamb. We will offer a Carnation inter-office memorandum dated September 19, 1961. I offer it into evidence at this time.

• • • • • • •

[fol. 386] (The document marked Plaintiff's No. 58 for identification was received in evidence.)

Mr. Alioto: This is dated September 19, 1961. It is to Don West from Melbourne Wright. Re: Pricing of Pet-Ritz and Swiss Miss.

By Mr. Alioto:

Q. Now, these are your two labels, are they not, Pet-Ritz and Swiss Miss?

A. They are, yes.

Q. Pet-Ritz is your 24-ounce pie and Swiss Miss is your 20-ounce economy pie?

A. Yes.

Mr. Billings: Your Honor, I have one further objection in connection with this document, and that is that it is dated September 19, 1961, which is some two or three weeks after the complaint was filed.

The Court: Objection overruled.

Mr. Alioto: From Melbourne Wright to Don West. And we have a situation—Don West is your West Coast Sales Manager?

Mr. Billings: That is correct.

Mr. Alioto: Who lived on the West Coast at this time? [fol. 387] Mr. Billings: Western Division, I think, is the title.

Mr. Alioto: "Re: Pricing—Pet Ritz and Swiss Miss."

He gives the prices for Pet-Ritz, first of all, pumpkin and mince, and the prices of Swiss Miss, and then it reads as follows:

"No warehouse stock maintained on 12/20 ounce Swiss Miss.

"As soon as I receive prices on Morton pumpkin and mince or any deal information, I will forward to you. Regards, Mel Wright."

And then follows this "P.S.: Pet Ritz, Swiss Miss pricing information received from Pet Headquarters."

By Mr. Alioto:

Q. Where were these Pet headquarters in September of 1961, Mr. Wohlhueter? Where was your principal office, place of business?

A. General Offices are in St. Louis, Missouri.

Q. St. Louis, Missouri?

A. Yes, sir.

Q. You had nothing else at that time that you could designate as "headquarters," did you?

A. I haven't heard that term used in the organization. We always call it the "General Office."

Mr. Alioto: We will offer next, if your Honor please, Plaintiff's Exhibit 59, which is an inter-office memorandum; a Management report, from Mr. D. J. Nord.

* * * * * * *

(The document marked Plaintiff's Exhibit No. 59 for identification was received in evidence.)

[fol. 388] Mr. Thatcher: What date is that exhibit, please, Mr. Alioto?

Mr. Alioto: This is 59, which is December 2, 1960. This reads as follows: Management Report from D. J. Nord. Sales. Salt Lake Division.

"Our Pet-Ritz variances were caused primarily because our Pumpkin and Mince pie business was down. We did not meet competitive deals that Simple Simon and Utah Pies had, and as a result, no new volume was generated.

"Original forecasts were based on last year's volume in Spokane. Since we have not regained our distribution with Albertson's, our volume has not been anywhere near our expectations.

"Most Pet-Ritz volume has held up very well in spite of competitive deals. We feel that we have been able to retain this by having Swiss Miss to offer them. A. G. in Pocatello has repurchased Pet-Ritz.

"Swiss Miss distribution is gaining. Safeway, Butte, U.R.M., Spokane and Northern Jobbing, Great Falls, have all bought for the first time."

Mr. Lamb: What is the number?

Mr. Alioto: This is 59 in evidence. If your Honor please, I think I neglected to offer 48 in evidence, and offer it at this time. 48 is an inter-office memorandum from D. J. Nord to J. A. Dodge, a Management letter. I think I read it, but it is not technically offered in evidence, according to the clerk.

Mr. Lamb: No objection to either one.

The Court: Received.

(The document marked Plaintiff's Exhibit No. 48 for identification was received in evidence.)

* * * * * * *

[fol. 389] By Mr. Alioto:

Q. Mr. Wohlhueter, you were one of the men in your organization who helped prepare the information, the factual information, for the response to the interrogatories which were filed on your company under the Federal Rules of Civil Procedure; that is correct, is it not?

A. That is correct.

Mr. Alioto: I want to read into the record, if your Honor please, the national sales of frozen pies of the Pet-Ritz Company, as reflected in the interrogatories.

The Court: You may.

Mr. Alioto: National sales of frozen pies are as follows: 1957, 2,152,000 cases; 1958, 2,541,460 cases; 1959, 4,765,771 cases; 1960, 4,041,116 cases; 1961, 5,223,610 cases.

By Mr. Alioto:

Q. Now, it is a fact, is it not, Mr. Wohlhueter, that there have been no net profits for these years on the sales of all of those pies?

A. That is correct.

Q. There came a time, did there not, Mr. Wohlhueter, when your company decided, as a matter of policy, that it would mark it a 20-ounce, so-called economy pie?

A. That is correct.

Q. Is that correct? And did you do any work in connection with preparing cost figures at the time that determination was made?

A. Just prior to my leaving the Division there was discussions on going into a so-called economy pie, and I probably participated in those early studies, but it was not until sometime after I left the Division that they finally decided on a formulation, weight, and a name, and actually got into the production of the Swiss Miss pie.

Q. Since that time, Mr. Wohlhueter, have you personally done any work on the cost differential, that is, the cost figures in the production of your 20-ounce pie, as against your 24-ounce pie?

A. I am not sure that I understand, but we calculate the cost every month on each of those products.

• • • • • • •

[fol. 390] Mr. Alioto: Let me mark for identification, if your Honor please, as Plaintiff's Exhibit 60 for identification—this is an inter-office Pet document entitled, "Product Accounting," to John Bitner under date of September 23, 1960.

I haven't offered it yet.

By Mr. Alioto:

Q. Mr. Wohlhueter, would you be good enough to look at that document and once more identify John Bittner for us?

A. At that time he was frozen foods product manager for the Milk Products Division.

Q. Now, this study, or the writer of this inter-office memorandum, is the man whose initials are J.B.E. Would you be good enough to identify him?

A. That's James Eades, E-a-d-e-s.

Q. E-a-d-e-s. And who is he?

A. He's the product accountant. Works on frozen foods.

Q. And what does product accounting mean, in the sense in which it is used in this interoffice memorandum?

A. We have product managers for each of our major product lines; and we have accountants assigned to accounting for the particular product line. In this, Jim Eades accounts for frozen foods product line.

Mr. Alioto: We'll offer this in evidence—

• • • • • • • •

[fol. 391] The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 60 for identification was received in evidence.)

Mr. Alioto: This reads as follows: "John Bittner, Product Accounting, September 23, 1960. Cost comparisons, 22 and 24-ounce pies.

"Per your request of September 21, we have completed the cost comparison which you requested. In computing the apple pie fill cost on each of these studies, we have used the latest available estimate for the new pack cost. Boysenberry pies on each study is computed on the Swiss Miss formula using Frankfort costs."

By Mr. Alioto:

Q. Frankfort is your Michigan plant, is it not?

A. That is correct.

Mr. Alioto: "The crust cost Swiss Miss, as well as Pet-Ritz, direct labor and overhead are the current Frankfort standard costs. Packaging costs are based on the latest actual costs for the packaging material used. If you have any questions relative to these cost comparisons, please contact me."

By Mr. Alioto:

Q. Now, I want to call your attention to the cost comparisons that are made between the 22-ounce and the 24-ounce.

Mr. Lamb: If your Honor please—

Mr. Alioto: I'm not going to reveal any figures—

[fol. 392] Mr. Lamb: Counsel is making a mistake here. I think it's a 20-ounce pie.

Mr. Alioto: This cost comparison is between 22 ounces and 24 ounces, Mr. Lamb; and I don't intend to read off any figures on this matter. I just want to call his attention to one matter.

Mr. Lamb: If your Honor please, we've never manufactured a 22-ounce pie. That's the point.

Mr. Alioto: I understand that, if your Honor please. But we do have in this case an issue in one matter relating to another defendant as to the difference in costs between the manufacture of 24-ounce and 22-ounce pies.

Mr. Schafer: No, your Honor, I'm sorry, we do not have that issue. He's talking about Morton, obviously; and Morton is not talking about cost justification or anything else about 24 versus 22 ounce pies. We've gone through all that. It's not an issue in this case. It doesn't make any difference what the difference in costs—

The Court: Well, I don't know what he's going to use this for. I don't know what it's about.

Mr. Schafer: He's just said, your Honor, that there's an issue about what it costs to make a 24-ounce pie—

The Court: I understand that.

Mr. Schafer: And a 22-ounce pie.

The Court: But I don't know what it's about.

Mr. Lamb: Your Honor please, may I ask a few questions on voir dire? Maybe I can clear it up.

Mr. Alioto: It's already in evidence. It seems to me the voir dire portion has passed along. We can clear it up very simply if I can go ahead.

The Court: Go ahead.

Mr. Schafer: May I just note my objection for the rec-
[fol. 393] ord, your Honor, if it's being offered for the purpose that counsel suggested that it was?

The Court: Surely, surely. The objection is overruled.

By Mr. Alioto:

Q. Now, it is a fact, is it not, in accordance with the studies made by your company that the packaging costs and the direct labor costs are the same on the 22-ounce and the 24-ounce pie?

A. On this schedule they show they are, yes.

Q. And what is this cost? Can you read that?

A. "Crust," it appears to be.

Q. So that the crust costs are the same; is that correct?

A. That is correct.

Q. The only difference, then, is in the fill cost, the actual ingredient that goes into it, as you folks have made this study?

A. On this study, yes.

Mr. Alioto: Has this been received in evidence?

The Court: Yes.

By Mr. Alioto:

Q. Now, with respect to your Swiss Miss, that's a 20-ounce pie as against a 24-ounce pie?

A. That is correct.

Q. And prior to the time that you introduced Swiss Miss, you folks had some kind of a market study made, didn't you?

A. I don't know whether we did or not.

Q. Do you know an organization known as M.R.C.A.?

A. I've heard of it, yes, sir.

Q. Market Research—

A. —Corporation of America.

Q. Corporation of America?

A. Yes, sir.

Q. I want to read from your annual report, which is Plaintiff's Exhibit 2, this portion: "As a result of a comprehensive study of the nation's frozen dessert pie market, we concluded that a strong demand exists for a good economy-priced pie. Therefore, we have developed what tests have demonstrated to be the finest frozen pie in the economy field.

"Early in 1960 we began initial marketing of our new Swiss Miss line of economy frozen pies in the selected regions of the midwest. We expect to expand distribution on a market by market basis. In a statement of purpose to the trade, we clearly announced our determination 'to establish leadership in the economy field, just as we have accomplished it in the quality field with Pet-Ritz.' The [fol. 394] groceries trade early favorable reception of this newest member of the Pet family of fine products has been very satisfying."

Now, the study referred to here, the comprehensive study of the nation's frozen dessert pie market—

Mr. Lamb: If your Honor please, since the witness has indicated he is not familiar with this M.R.C.A. study, I would be very happy to stipulate with counsel that it be received in evidence, subject to check that it's the same document that we're talking about.

Mr. Alioto: This is what I was going to ask the witness.

Mr. Lamb: I don't think he knows anything about it. That's the reason that I'm offering to stipulate.

Mr. Alioto: Well, he does know this part. I was going to ask—can we agree that the "Comprehensive Study of the Nation's Frozen Dessert Pie Market" which I've just read from your 1959 annual report is in fact the M.R.C.A. presentation to Pet-Ritz, or Plaintiff's Exhibit 61, which I'm now holding in my hand?

Mr. Lamb: Well, his answer to that would be that he doesn't know.

Mr. Alioto: I'm asking you if you can stipulate.

Mr. Lamb: I can stipulate that we had that document and three other documents that were from different companies. We didn't just do the M.R.C.A. study—

Mr. Alioto: Well, let me ask this question. M.R.C.A. was one of the documents involved in "the comprehensive study of the nation's frozen dessert pie market" which is mentioned in your '59 annual report?

Mr. Lamb: That is accurate, Mr. Alioto, and I'll be very glad to stipulate this document into evidence.

• • • • • • •

[fol. 395] Mr. Schafer: My understanding is that counsel is not offering it against Continental.

Mr. Alioto: As of this moment it's being offered against the Pet Company only.

The Court: Received in evidence.

Mr. Lamb: No objection.

(The exhibit marked Plaintiff's Exhibit No. 61 for identification was received in evidence.)

• • • • • • •

[fol. 398] By Mr. Alioto:

Q. Now, it is a fact, is it not, Mr. Wohlhueter, that after the introduction of Swiss Miss by the Pet-Ritz Company, that Swiss Miss was promoted more actively in the Sale Lake market than was the Pet-Ritz label?

A. Yes.

Mr. Lamb: I object to the question as not within the knowledge of this witness, your Honor.

The Witness: I can't answer that question.

By Mr. Alioto:

Q. Don't you prepare the statistics in connection with production of pies? Don't you have something to do with that since Swiss Miss came on the market?

A. On a national basis, Mr. Alioto. We only account for—

Q. On a national basis, does Swiss Miss sell more than Pet-Ritz? In 1961?

A. No.

Q. It sells less than?

A. Yes.

Q. On the other hand, do you know whether or not Swiss Miss in the Salt Lake and Southern Utah market sell substantially more than Pet-Ritz?

Mr. Lamb: Your Honor, I object to that. The Witness has already said he doesn't know.

Mr. Alioto: All right. We'll offer in evidence, if your Honor please, in connection with that matter, a market share study which was provided to us by the defendants in connection with this subject matter of Swiss Miss as against Pet-Ritz.

Mr. Lamb: If your Honor please—

Mr. Alioto: We'll offer this as our exhibit next in evidence.

Mr. Lamb: I'll object to the introduction of these documents on the ground that they were lifted from a study which was made by the defendants in this case; and unless the entire study is introduced as a whole, the jury could become confused.

• • • • • • •

[fol. 399] The Court: The objection is overruled, and they're received.

(The exhibit marked Plaintiff's Exhibit No. 62 for identification was received in evidence.)

Mr. Alioto: This document shows, among other things, the Swiss Miss against Pet Ritz in the Utah and southern Idaho area. In 1958 there were no Swiss Miss sold, and 9300 dozens of Pet-Ritz. In 1959, no Swiss Miss, 20-ounce County Pie, and 14,000 Pet-Ritz. 1960, 20,000 Swiss Miss, 8,000 Pet-Ritz. 1961, 48,000 Swiss Miss, 3,700 Pet-Ritz.

[fol. 400] By Mr. Alioto:

Q. Now, Mr. Wohlhueter, is it your recollection that this dominance of Swiss Miss in terms of number over Pet-Ritz in this area, as I've just read it, is the opposite on a national basis? That more Pet-Ritz are sold on a national basis?

Mr. Lamb: I object to the question. There will be a witness here to answer all of these questions. It's not within the peculiar knowledge of this witness.

Mr. Alioto: He can answer this one.

The Court: I think he has already answered it. If he hasn't, you may proceed on it.

The Witness: I said that on a national basis, Pet-Ritz is selling in excess of Swiss Miss at the present time.

By Mr. Alioto:

Q. And was in 1960 and '61?

A. I can't say about that. I was not in the frozen food organization at that time.

Mr. Alioto: Okay. We offer at this time a Carnation document in relation to its 22-ounce and 20-ounce fruit pies. This is offered against the Carnation Company alone at this time.

Mr. Billings: May I look at it?

Mr. Alioto: Yes.

Mr. Billings: Again, your Honor, this is two more excerpts from these minutes; and I make the objection to the document on that ground.

The Court: The objection is overruled. If there's anything out of context that's distorted for that reason, you will have an opportunity in your turn to point that out. I think counsel is entitled to present portions of minutes that apply to the point that he's making. The objection is overruled.

Mr. Schafer: May I note an objection for the record, your Honor?

The Court: Yes.

[fol. 401] Mr. Alioto: I've offered it against the Carnation Company alone at this point.

Mr. Schafer: I am concerned about possible use of these costs studies of other companies—

The Court: Well, he isn't offering—

Mr. Schafer: I wasn't sure as to Number 60 whether he had or he hadn't.

The Court: All right.

Mr. Schafer: Did you offer 60 against Continental?

Mr. Alioto: No.

The Court: Not at this time.

Mr. Schafer: Right.

Mr. Alioto: Now, these are all of the minutes of the Carnation Company relating to the subject matter of 22-ounce and 20-ounce fruit pies, and we can take this up at a later time, and we'll offer it into evidence at this time.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 63 for identification was received in evidence.)

Mr. Alioto: With that, if your Honor please, we have no further questions of Mr. Wohlhueter.

Mr. Billings: Your Honor, I think that last statement made again proves my point. He just stated here in front of the jury—

The Court: Don't argue. You will have an opportunity to do whatever you want to do about that in your turn. Mr. Alioto is putting his case on now. Your objection is overruled.

. . . . . .

[fol. 402] CHARLES V. BYE, called as an adverse witness by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Bye, would you be good enough to state your full name for the record, please.

A. Charles V. Bye. (Spelling) B-y-e.

Q. Where do you reside, sir?

A. Fullerton, California.

Q. Fullerton, California?

A. Fullerton.

Q. That is near Los Angeles, is it?

A. Correct.

Q. Where is your business address?

A. 5045 Wilshire Boulevard, Los Angeles.

Q. What is your present position or occupation, Mr. Bye?

A. I am the controller of the Frozen Food Division of the company, Carnation Company.

Q. Carnation Company. For how long a period of time have you held that position?

A. About three years now.

Q. You began when?

A. I began in May of 1955 in Waterloo, Iowa.

Q. Yes.

A. And was transferred to Los Angeles, and the Frozen Food Division in October of '58.

Q. What were you doing in Waterloo, Iowa?

A. I was a junior accountant.

Q. A junior accountant?

A. In the Fresh Milk Division.

Q. And in 1958 you were transferred to the Los Angeles office of Carnation?

A. I was assistant to the controller at that time.

Q. In the Frozen Food Division?

A. Correct.

Q. The Carnation Company's headquarters, I take it, are in Los Angeles, California?

A. That's correct.

Q. What, generally, have been your duties with respect to frozen pies while you have been with Carnation, beginning in 1955?

A. Oh, I am charged with preparing the profit and loss statements, cost studies, and anything along that line, any accounting functions.

Q. How long a period of time have you been preparing so-called profit and loss studies?

A. Studies?

Q. Yes.

A. You mean profit and loss statements?

Q. Profit and loss statements, yes.

A. Since I came out there in October of 1958.

Q. I want to show you a document which has previously been marked Plaintiff's Exhibit 5 for identification in this [fol. 403] case, which is headed, "Budgets, Carnation Company." Would you be good enough to explain generally for the record the nature of the so-called budgets of the Carnation Company?

A. You mean what they are for—

Q. Yes, what they are.

A. (Continuing) —how many there are, or what?

Q. Yes, what they are.

A. Well, our company has a policy of preparing budgets for Management several times a year, and they are consolidated and used on a consolidated basis for the company, and, as I say, they are prepared several times a year.

Q. Are these budgets, in effect, forecasts of the business you expect to do in various areas?

A. That is correct, on a total basis. We don't break them down too much beyond Western and Eastern, as they are here.

Q. Yes.

A. And they estimate fruit prices that we are going to get, labor prices, and so forth.

Q. They also estimate whether or not you expect to make a profit or a loss, do they not?

A. That is correct. However, since I have personally been doing them, I am very conservative, and I do them on a conservative basis.

Q. Who was responsible for giving you the purchase price that is likely to be achieved in a given market? When you make up a budget, who tells you what price to put down?

A. Selling price, you mean?

Q. Yes.

A. Our selling prices?

Q. Yes, sir.

A. I use the current price list we have in effect or, if we contemplate a change, I am given that by the Sales Department.

Q. But, basically, you use the price lists which are then in effect?

A. That's correct.

Q. Who gives you a notion of what your volume, your expected volume in a given market, may be?

A. That comes from the Sales Department.

Q. The Sales Department. And who are the people in the Sales Department with whom you have worked on these matters, Mr. Bye?

A. Mr. Murphy is the one I get the information from, and he gets it from the field, I assume.

Q. What is Mr. Murphy's position with the company?

A. He is merchandising manager.

Q. Including frozen pies?

A. Correct. For frozen pies, Frozen Food Division.

[fol. 404] Q. To what extent has Mr. Murphy cooperated with you in the making up of these forecasts or these budgets?

A. He gives me volume, and that is it.

Q. And that is all?

A. That is all he gives me. One minute. Let me correct that. With volume, of course, is the anticipated deals to be spent on that volume, and that is all.

Q. Now, the deals, then, in effect, would be deductions off the price list, is that it?

A. Well, a deal, in our business is an allowance. It could be off invoice, it could be an advertising allowance, a consumer offer, of many types.

Q. We have run into this expression "off invoice deal" in some of the Carnation exhibits. Would you be good enough to explain to the Court and jury what that means?

A. In some markets an off invoice deal is more attractive than an advertising type of allowance, so it simply is reflected right on the face of the invoice, and therefore off face of the invoice deal.

Q. In other words, what it means is a deduction from the invoice price, whatever that is?

A. On the face of the invoice, correct.

Q. Is that, in effect, a price decline rather than an advertising allowance?

A. A temporary price adjustment possibly.

Q. In other words, it is a price cut, temporary or otherwise, depending on how long it lasts? It is a price cut, is that it?

A. That isn't the terminology we use for it. It is an allowance that is given off the face of the invoice, because that particular market is interested in that kind. But we don't consider it a price cut.

Q. Does the man who receives it have to perform any services of benefit to the Carnation Company in order to receive it?

A. No, sir.

Q. He does not. In other words, the invoice price is one price, and they give him a price off the invoice, and that is the price decline we are speaking of, isn't it?

A. Correct.

Q. Now then, would you be good enough, Mr. Bye, to help us—for example, let's take this 1959 forecast, which is contained in Plaintiff's Exhibit 5 for identification. You will note that that is broken down by the Southern California

Division, Northern California, and Reno, Arizona, Pacific Northwest, and Mountain States.

A. Yes.

Q. Would you first be good enough to tell us what area [fol. 405] is generally encompassed in the designation "Southern California."

A. It is generally Los Angeles and San Diego, area in the close proximity of Los Angeles.

Q. How about northern California? What's the geographical area there?

A. It's generally San Francisco, Oakland, and that area. And this—

Q. Does it include Nevada?

A. It includes Reno, Nevada. Las Vegas would be southern California.

Q. Then in that third designation is that just the State of Arizona?

A. Now, I did not prepare this forecast. I don't know just what was in there. Phoenix is all that we have in ours, Phoenix, and as you know, later we put El Paso in there. I don't know whether it's in here or not.

Q. Okay. Now, when you use the designation Pacific Northwest, not in conjunction with the Mountain States, but simply Pacific Northwest, what states are encompassed within that designation?

A. Well, we combined those, as you know, in later years.

Q. Yes, I know.

A. I'm not sure I could break those up, no. I'm not I could remember them.

Q. What states were involved in the joint designation, Pacific Northwest and Mountain States when you put them together?

A. It's this so-called Intermountain Area, I suppose, Washington, Oregon, Montana, Utah, Idaho. I'm not sure of all of them.

Q. How about eastern Nevada?

A. Eastern Nevada? Now, there again, I don't know exactly what counties fall in here. This is not my problem.

Q. Now, would you be good enough to look at that 1959 forecast. That purports to be a forecast for the entire year of 1959, doesn't it?

A. It appears to be, yes.

Q. Yes. And it purports to forecast what profit you're going to make in southern California? Is that correct?

A. Yes.

Q. How much is that?

A. Might I state that I didn't prepare this, so I'm reading someone else's figures.

Q. All right. Would you be good enough to tell us whether or not Mr. Murphy was at that time in any marketing position?

A. That I couldn't answer. I believe he was in the advertising—or sales managership—at that time. But, as I say, I did not prepare this. But he was—he had something to do with it, undoubtedly, the volume.

Q. What's that exhibit show that your company in 1959 [fol. 406] forecasted for the southern California area?

A. It shows a $96,000 profit.

Q. $96,000 profit. And what did you forecast for the northern California area?

A. $81,000.

Q. Profit?

A. Profit.

Q. And what did you forecast for the Arizona area?

A. $3,300 profit.

Q. Now, what did you forecast for the Mountain States area?

A. $12,648 loss.

Q. A loss? And what did you forecast for the Pacific Northwest area?

A. $13,229 loss.

Q. Now, I take it that forecasts from 1959 on were prepared in substantially the same way, except that the divisions changed somewhat, did they?

A. They would have been prepared in similar manner.

Mr. Alioto: We'll offer in evidence, if your Honor please, this as the plaintiff's exhibit next in order.

* * * * * * *

Voir dire examination.

By Mr. Billings:

Q. Mr. Bye, this proposed Exhibit 5 is a photostat, is it not, of the documents which were prepared in the Carnation Company office?

A. That's correct.

Q. Now, for example, the one he was just asking you about, forecast 1959—and it appears in one sheet—he asked you about southern California, northern California, Arizona, and Pacific Northwest, Mountain States. Is the next sheet in this proposed exhibit, which is captioned, "Texas, Louisiana, Midwest, Southeastern"—is that all part of the same piece of paper in the original document?

A. It's a continuation of the same page. They've photo-
[fol. 407] graphed half of it at a time, and this is our—

Q. Is that true of each of these documents?

A. Well, some of them are only eight and a half by eleven, but the front pages in most cases were long, thirteen column sheets, and they were photographed in two pieces.

Q. So the budget forecast, for example, 1959, would have on the same sheet the other divisions and areas of the company?

A. That's right.

Mr. Billings: With that, I have no objection.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 5 for identification was received in evidence.)

By Mr. Alioto:

Q. Now then, in addition to actual budgets, you of course have records in addition to budgets, you of course have

records which show your actual profit and loss at the end of the years for various divisions?

A. That's correct.

Q. Would you be good enough to look at Plaintiff's Exhibit 6 for identification and state whether those are the divisional P & L statements for the Carnation Company?

A. They appear to be what I call the territorial P & L profit and loss statements.

Q. And what does the territorial profit and loss mean?

A. Well, we attempt to on a monthly basis break this down as best as we can into these areas we've spoken of before, southern California and northern California and so forth.

Q. To show the profit and loss actually made or actually incurred, as the case may be?

A. Well, the only actual figure that we can rely on is the total actual figure, and that may include some adjustment. When I break it down by territory I have to make several arbitrary allocations, which another accountant may do another way and the figures may come out a little bit different.

Q. I take it that in each of those instances there is an intent to apportion what's called overhead or G & A to each of the areas; is that correct?

A. That's correct.

Mr. Alioto: We'll offer this in evidence, if your Honor please, as plaintiff's exhibit next in order. We have no [fol. 408] further questions of this witness.

Mr. Billings: I may want to ask a voir dire question on this.

Voir dire examination.

By Mr. Billings:

Q. Mr. Bye, the top one here happens to be Territorial Profit and Loss Statement, December of 1959. I assume the same thing you told me about the other exhibit is true with

respect to this one; that is, that one sheet has been cut in two for purposes of reproduction; is that correct?

A. That's correct.

Q. Now, I call your attention to the December 1959 sheet, December 1960 sheet, and the December 1961 sheet of this proposed exhibit. Does that show the Territorial P & L for the frozen food division for those years accumulatively up through the year?

A. Correct.

Mr. Billings: Exhibit 22 is the one I'm looking for. Do you have Exhibit 22, Mr. Alioto?

Mr. Alioto: Yes. Right here.

Mr. Billings: Thank you. No wonder I couldn't find it.

By Mr. Billings:

Q. Now, Mr. Bye, I call your attention to the sheets which were attached to Plaintiff's Exhibit 22, and I ask you what the difference is, for example, on the, this sheet which is captioned, "Carnation Company Frozen Food Division Territorial Profit and Loss Statement for 1959," and this sheet in this proposed Exhibit 6 which says, "Carnation Company Frozen Food Division Territorial Profit and Loss Statement, December, 1959."

A. I'm not sure I understand the question.

Q. Well, is this sheet—here is the one I'm looking at—

A. No.

Q. Is this sheet—

A. This is a monthly sheet here, I believe. And the ones attached there are the year to date accumulative sheets.

Q. What is the difference between the monthly sheet for December, 1959, and the year to date sheet for December, '59, which is already in evidence?

A. Well, as I say, this is just a monthly sheet, and this [fol. 409] is a 12 month—recap of each of the twelve months. This is only December of '59 here. That's all twelve months.

Q. If you added up the monthly statements for each month which are in this proposed exhibit, would you come out with the same figure as you would if you took the year to date sheets which are already in evidence?

A. No, not necessarily. That's why Mr. Caldwell and I had a problem. During the year we find some cases where an allocation we have made may have been an error in one or the other months. And we always attempt to correct them at the end of the year. So that the twelve month accumulative will be a twelve month correct figure at the end of the year. Some of the months may be slightly in error, and they would not add, I don't believe, right through.

Mr. Billings: That completes my voir dire, your Honor, and I have no objection to Plaintiff's Exhibit 6.

The Court: Received.

Mr. Alioto: The plaintiff will next call Mr. Murphy of the Carnation Company as an adverse witness.

RALPH F. MURPHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Alioto:

Q. Would you be good enough to state your full name for the record, please, Mr. Murphy?

A. Ralph F. Murphy.

Q. Where do you reside, sir?

A. Los Angeles.

Q. What is your present business or occupation?

A. I am merchandise manager of the frozen food division of the Carnation Company.

Q. For how long a period of time have you held that position as manager?

A. Merchandise manager?

Q. Yes.

A. Oh, since about October of 1955.

Q. And prior to that time what position did you hold in connection with the frozen food division?

A. I wasn't in the frozen food division prior to that time.

Q. Was Carnation in the frozen food division prior to that time?

A. For several months—they acquired Simple Simon a few months prior to the time that I came out.

[fol. 410] Q. And in other words, the Carnation Company didn't start from scratch in connection with its frozen pie business, did it?

A. Not all of the items, no.

The Court: May I interrupt you?

(Recess.)

The Court: All right. You may proceed.

By Mr. Alioto:

Q. Mr. Murphy, before the recess, we were talking about how Carnation got into the business. I take it it got into the business by acquiring an independent frozen pie manufacturer?

A. That's correct.

Q. And that company was called the Simple Simon Company?

A. I think the correct name was Mrs. Lee's Pies, although I'm not entirely sure of that.

Q. And the company acquired that Mrs. Lee's Pies which had the label Simple Simon; is that correct?

A. Correct.

Q. And you carried on with that label after the acquisition of this other company?

A. Correct.

Q. I'd like to direct some questions to you, Mr. Murphy, about the pricing policy generally or the pricing patterns generally of the Carnation Company, if you'd be good

enough to help us with it. To begin with, you sell on a zone basis, do you not?

A. Delivered zone basis.

Q. You have delivered prices within certain zones?

A. Correct.

Q. What, if anything, did you have to do with the setting up of those zones?

A. I had nothing to do with the actual setting up of the zones as they are. I worked along with the—with Mr. Hogue, who was actually setting them up.

Q. Mr. Hogue is not living at the present time, is he?

A. That's correct.

Q. But you did work along with him?

A. Yes.

Q. At the time you set up these zones, do you recall whether or not the Pet Milk Company was in the frozen pie business?

A. That I couldn't answer. Pet Company came into it after we did, and whether or not they had zone pricing is something I couldn't tell you.

Q. Do you mean to say, Mr. Murphy, that over all these years you have been merchandising manager of the Carnation Company that you don't even know whether the Pet Milk Company has a zone price system?

A. That isn't what you asked me.

Q. I thought you said that you don't know.

[fol. 411] A. I know they have one now. You asked me at that particular time.

Q. All right. Now, you do know that the Pet Milk Company has a price zone system now?

A. Correct.

Q. Do you know whether or not the Continental Baking Company, or the Morton Pie Division of that company, has a zone pricing system now?

A. I believe they do.

Q. You know that, I take it, because you have received competitive reports on it, is that the situation?

A. Yes, sir.

Q. How many price zones does the Carnation Company have?

A. I believe that there is five of them.

Q. What is the name of the price zone that is located closest to your plant in Torrance?

A. That would be either 1(a) or 1(b). We break California down into 1(a) and 1(b) and, unless I had the sheets in front of me, I couldn't tell you, but it would be either one or the other.

Q. One is Northern California and the other is Southern California, is that the situation?

A. Correct.

Q. Has California always been divided into those two zones?

A. No, sir.

Q. When did you make that division of California into those two zones?

A. Well, we—there isn't any real pattern there. At one time it is all one zone, and then, because of competition in a certain area, why, we may break them down in Zone 1(a) and 1(b).

Q. And every time you have issued your price lists, I take it, you have designated the 1(a) or 1(b) zone as they were in existence?

A. Yes, sir.

Q. And so by following all of your price lists we could determine exactly when it was that you began to use the 1(a) and 1(b) designation?

A. No problem.

Q. And you are still using that 1(a) and 1(b) designation?

A. Currently we have 1(a) and 1(b) in California.

Q. And in 1958 and 1959 you had only the State of California in one zone, is that correct?

A. I wouldn't know unless I saw the record.

Q. At or about the time that you assisted Mr. Hogue in the setting up of the various zones, did you attempt to

familiarize yourself with whether or not your competitors were also on a zone price basis?

[fol. 412] A. No. We only gave into consideration our own thinking of setting up a price structure.

Q. Did you inform yourself as to whether or not your competitors were, in fact, also selling on a zone price basis?

A. No.

Q. In connection with zone prices, that means, does it not, that people within certain geographic zones will pay the same price, regardless of how close they are located to the plant?

A. That's true. We sell on a delivered basis.

Q. So if you take, on a delivered basis, the purchaser who is located immediately adjacent to the plant will pay the same price as the purchaser in that zone who is located the furthest distance from the plant?

A. Not necessarily.

Q. Well, what would make that difference?

A. Well, the difference would be a competitive situation. For example, we could have a competitive situation in Los Angeles that would change our price, reduce our price, in Los Angeles, and the same—we may not have the same price structure in New Orleans, for example.

Q. Where?

A. New Orleans. Or any place else.

Q. I am talking about people located within the same zone.

A. I am sorry, I misunderstood you.

Q. Yes.

A. Everybody in the same zone would get the same price.

Q. Regardless of distance to the plant?

A. Correct.

Q. Do you have, or have you had generally, a price differential between a warehouse, and ex-warehouse price as against a truck price?

A. Yes, sir. We have four brackets in our price structure.

Q. And there is a differential between each of those brackets, is that correct?

A. Correct.

Q. So far as other zones are concerned, take a Northwest zone. Has your pricing generally been on the basis of charging the same base price in the Northwest zone as you have in your California zone?

A. Well, I don't believe I can answer that unless I could have the record in front of me.

Mr. Alioto: We will place into evidence at this point, if your Honor please, Plaintiff's Exhibit 64, which is the Carnation price list for Zone No. 1; 65, the Carnation price list for Zone No. 2.

[fol. 413] Mr. Billings: May I ask: Does that purport to be a complete set?

Mr. Alioto: I think it is. I am not sure. I can't say that now.

They appear to be a complete list of all of your price lists except Exhibit 41, which was taken out for another reason.

We will offer Plaintiff's Exhibit 66, which are the Carnation's so-called national price lists, Zone 7.

Mr. Billings: What you mean is that they are Zone 7 and 1(a), Zone 5, Zone 4.

Mr. Alioto: That's correct.

Mr. Billings: Whatever zones they are.

• • • • • • • •

(The documents marked Plaintiff's Exhibits Nos. 64, 65, and 66 for identification were received in evidence.)

By Mr. Alioto:

Q. Did you ever make a study at any time, Mr. Murphy, to determine how your price zones compared to, say, the Pet price zones?

A. No, not on a zone basis. We look at a study market by market, not in any particular zone.

• • • • • • • •

[fol. 415] Q. Do you have any responsibility in the Carnation Company for recommending price cuts in the Salt Lake City area?

A. Yes. I would recommend programs for any area of the country, the country that we operate in.

Q. Including the Salt Lake City area?

A. Yes, sir.

Q. I take it you would get some information from the field and that you were the man responsible for passing that on to the executives of the Carnation Company for getting permission?

A. Yes. The information would flow from the field either to the sales manager or direct to me.

Q. And when it comes to you, what do you do with it?

A. I take a look at it and analyze it and decide what kind of a recommendation that I am going to make, and after I decide the recommendation, I pass it on to the manager of the Frozen Food Division. Then he decides whether or not we will take it before the committee.

Q. So that the final decision in your organization is the manager of the Frozen Food Division, is that it?

[fol. 416] A. No, sir.

Q. What happens after he makes a determination as to what should be done?

A. Then it goes to the Frozen Food Committee, and they make the decision.

Q. What is the nature of that committee?

A. I don't understand that question.

Q. What kind of a committee is it? What is it, what does it do?

A. Well, they make decisions as far as we are concerned, and whether or not we are going to spend "X" number of dollars, and how we are going to spend it, and where we are going to spend it.

Q. Is that the ultimate authority in the organization as to whether or not there should be a price cut in any given area?

A. I am not just sure of that. I believe it is, but I am not sure. We also have an Executive Committee in the Carnation Company, and they may or may not pass on it, I don't know.

Q. Well, so far as you know, and from the standpoint of your own presentations, have you made your presentations to this Frozen Food Committee?

A. That is correct.

Q. Have you ever made a presentation to the Executive Committee?

A. No.

Q. And have you heard the Frozen Food Committee make the determination in your presence as to what would be done in a given situation?

A. Sometimes they do and sometimes they don't.

Q. Now, at the times they don't, do they somehow communicate with you what their decision is on the matter?

A. Not to me. They would go back to the manager of the Frozen Food Division, and he would communicate to me.

Mr. Alioto: We will offer at this time, if your Honor please, Plaintiff's Exhibit 67, which is a marketing program of the Carnation Company, dated December 31, 1959.

Mr. Billings: I think, Mr. Alioto, these all come from the same source, and if you want to offer them all, I would like to voir dire the witness with respect to them.

Mr. Alioto: Yes, I will offer them all. That is 68, dated April 21, 1960, marketing program on 9-inch fruit pies, 69 dated January 19, 1961, entitled "Deal Seven, 8-Inch Fruit Pies, Salt Lake and Boise"; Exhibit 70 is a marketing program under date of February 17, 1961; Exhibit 71 [fol. 417] is a marketing program, territory service from Torrance, April 6, 1961; Exhibit 72 is a marketing program for the Western territories, dated June 1, 1961; Exhibit 73 is a marketing program for certain territories dated June 1, 1961; Exhibit 74 is a marketing program dated July 20, 1961 for 8-inch fruit pies and the Sixth Sales Assignment.

* * * * * * *

Mr. Alioto: Mr. Billings, you won't have to waste time with the witness on that. You tell me what they are and I will stipulate with you.

Mr. Billings: They are portions of the minutes of the Frozen Food Division.

Mr. Alioto: All right, I will stipulate to that, Mr. Billings. You don't have to waste the time.

* * * * * * *

Mr. Billings: Your Honor, I make the same objection and request I made with respect to these other minutes. [fol. 418] These are minutes picked out at random, pages from the minutes picked out at random, from the complete volume. I have no objection to the introduction of these documents, subject to the introduction of the complete set of minutes.

The Court: I didn't say I was going to receive a complete set of minutes. That wasn't the understanding at all. I said I was going to receive these, and you could do whatever you wanted to do when you got around to it, and we will see whether we will receive them. Unless there is something in those minutes that you claim something for, I am not going to encumber the records with a whole flock of minutes that don't mean anything to anybody.

The understanding isn't that I am going to receive all the rest of the minutes. We are going to wait until you get your case going, and then you can do what you want to do about it, and I shall see what I shall do at that time.

Mr. Billings: May we have introduced, along with these, other pages of the minutes under the index numbers which appear on these proposed exhibits, so they will be complete?

Mr. Alioto: I know of no rule of law that compels you to put in all the minutes when you want to use certain minutes for certain dates. I never heard of it.

The Court: There is no question about that. You don't need to argue that.

Mr. Billings: They are taken out of context.

The Court: You will have an opportunity to see if they are out of context and, if they are out of context and there is a distortion, you will have an opportunity to point it out.

All I was addressing myself to in the last minute or two was that you said there was an arrangement now between us that the rest of the minutes would come in. Now, I didn't make any such arrangement with you at all. What I said was what I have just said again, that if they are out of context and, as a result, there is a distortion and you need to straighten something out, you could take that up with me when it gets your turn to put on your case, and whether we shall receive anything additional to those minutes depends upon whether there is anything that is relevant and material to the issues in this case.

[fol. 419] All right, we will receive them.

(The documents marked Plaintiff's Exhibits Nos. 67, 68, 69, 70, 71, 72, 73 and 74 for identification were received in evidence.)

* * * * * * *

Mr. Alioto: Exhibit 67, ladies and gentlemen, is a marketing program of the Carnation Company, Deals 27 through 31 on 9-inch fruit pies to Southern California, Northern California, Phoenix, El Paso, and Salt Lake City under date of December 31, 1959.

"Hogue presented information to Olson on a deal program by Johnston in five Western markets in which Johnston is offering a 33 cent per case performance deal, plus 5 cents coop. advertising allowance.

"Each of the five markets were checked, price-wise, and deal amounts for meeting the Johnston deal were determined. The following recommendations for a Simple Simon deal were made:

"Deal #27—9-inch fruit pies—Southern California, including Fresno.

"Deal Amounts: Apple—9¢ per case."

Getting down to Salt Lake City:

"Deal Amounts; Apple 13¢ per case."

Southern California, other flavors, 36 cents per case; Salt Lake City, other flavors, 41 cents per case.

Direct examination (continued).

By Mr. Alioto:

Q. Now, in that context, I take it, Mr. Murphy, that a [fol. 420] "deal" means that it is a price reduction of some kind by virtue of an allowance, an advertising allowance, or a straight price reduction, is that it?

A. I don't quite follow you there.

Q. In this situation you will notice, for example, that there is a 9 cents per case or 18 cents per dozen deal in Southern California where your plant is located, and you get down to Salt Lake City and you will see it is a 13 cents per case or 26 cents. In other words, 8 cents more per case. Now, that means 8 cents less, doesn't it?

A. Well, what that could mean—and I don't know whether it does or not; we would have to have a paper on it—is the fact that we could have had a difference in price in these markets and what we are doing with these variations, it looks like to me that we are leveling off these prices to be competitive with whoever it is here. I think you said Johnston. Because normally you wouldn't go nine, seven, nine.

Q. In any event, when it says "deal," and it gives a figure, that means a figure below some other price, isn't that correct?

A. That's correct. Well, our price—

Q. In the final paragraph:

"Olson informed Hogue the deals were approved."

Incidentally, in Northern California, excluding Fresno, the deal on apple was 7 cents, on other flavors 34 cents.

January 19, 1961, 8-inch fruit pies, Salt Lake and Boise.

"Hogue reported to Halgren that the 18 cents per case off face has been changed to 45 cents per case as of January 11 to meet competitive conditions in these two markets and that Salt Lake had requested a continuation of the 45-cent deal in order to snare additional distribution and step up volume."

• • • • • • •

[fol. 421] Q. Now, this 45 cents they're talking about in order to snare this additional distribution and step up volume was a straight-off invoice arrangement, wasn't it?

A. If it says so there.

Q. Well, you read it.

A. Correct. It is off the face. It is changed from 18 to 45.

Q. So that that is a straight price out, isn't it, without any question of advertising allowances or any other type of performances?

A. The reason we use a—

[fol. 422] Q. Is that true or not? And then you can say anything you want. Is that true, an off the face 45 cents in this context means a price cut, rather than some kind of an advertising allowance?

A. That is correct. And the reason—

Q. All right. Now, do you want to say something? Whatever you want to say.

A. The reason we go off the face of an invoice in any market is so that we will not have to change our list price. We go off the face of an invoice to meet a competitive situation. It's only on a temporary basis for a limited time only.

Q. In any event, it is a price cut?

A. Oh, sure.

• • • • • • •

Mr. Alioto: Exhibit 70, February of 1961.

"Murphy presented deals for the third sales assignment, March 27 through May 5, for 8-inch fruit pies as follows: Competition continues to program their 8-inch fruit pies. Deals vary by area. We are also faced with more private label competition Levy Zentner now has a private label fruit pie, Langfield *is* Round Up Grocery have private labels being sold at a price, and in some cases a price and a deal.

[fol. 423] "It is *believes* that substantially more 8-inch volume can be developed in California by improving 8-inch fruit pie distribution. Programs are being recommended

for all territories being serviced out of Torrance. The following is the 8-inch fruit pie recommendation for the third sales assignment, as well as the case estimates and costs."

Then follows:

"Los Angeles 25 cents advertising, northern California 25 cents advertising, Portland 25 cents merchandising, Seattle 15 cents merchandising, Montana 33 cents off face. Montana 20 cents merchandising, 18 cents off face, 20 cents merchandising, Spokane 18 cents off face, Boise, Salt Lake City 25 cents off face, Salt Lake City 45 cents off face, Arizona 25 cents advertising, El Paso 20 cents merchandising.

"The committee approved the above deals."

Exhibit 71, April 6, 1961. The preceding one was February 17, 1961.

"Murphy presented deals for 8-inch fruit pies for territories serviced by Torrance for the fourth sales assignment May 8 through July 7, 1961, as follows: "Territory, Los Angeles, 35 cents advertising; northern California, 25 cents advertising."

You come down to Salt Lake:

"45 cents off face; Boise 45 cents off face."

By Mr. Alioto:

Q. Now, when you say in northern California, 25 cents advertising, there's an actual performance that has to be proved by your purchaser in order to get that; isn't that a fact?

A. That's correct.

Q. So you don't regard it as a price cut, at all, do you?

A. It accomplishes the same thing. It gets pies to the consumer at a lower price.

Q. Don't you get something for it; namely, some advertising?

A. Well, they could run a line ad. The end result is a low price to the consumer. They would advertise the pies at a low price.

Q. Well, let me ask you in another way. Are your advertising allowances fakes, or are they real?

A. They are for real, believe me.

Q. Okay. Then they aren't price cuts, are they?

[fol. 424] A. I didn't say they were price cuts. They are not a price cut.

Q. They are not price cuts. Whereas an off face, 45 cents, as set out here, for Salt Lake City and for Boise, those two are in fact price costs?

A. That's correct.

Mr. Alioto: Exhibit 72, June 1, 1961. The preceding one was April 6, 1961.

"Murphy gave an outline—"

Incidentally, I would say "Mr. Murphy" that this is the way it reads:

"Murphy gave an outline of sales conditions and volume in the various territories and divisions. This was followed with a recommendation for deals for the fifth sales assignment, July 10 through August 18, 1961. The recommended deals for the specified territories follow, along with the amounts and type deal. Los Angeles and Fresno, 35 cents a case, type deal, advertising, flavors, all; northern California, 30 cents a case, advertising, all flavors; Salt Lake, 45 cents a case, off face, all flavors; Boise, 45 cents a case, off face, all flavors."

Now, Exhibit 73, June 1, 1961. It's the same date as the prior.

"Murphy gave an outline of sales conditions and volume in the various territories and divisions. This was followed with a recommendation for deals for the fifth sales assignment, July 10 through 18, 1961."

This appears to be the same, but on different documents, but it follows—then the prices are as follows:

"Los Angeles and Fresno, 50 cents a case, advertising; northern California, 50 cents a case, advertising; Phoenix, 50 cents a case, advertising; Salt Lake City, 45 cents a case, merchandising."

By Mr. Alioto:

Q. Now, we've run into another word. What is the difference between a merchandising deal and an advertising deal?

A. Well, actually, to a great extent it's terminology. We would get an ad and/or increased cabinet space for a merchandising deal. It's a billback, as we term a billback.

[fol. 425] Q. So far as Salt Lake City was concerned, that 45 cents a case was actually, was it not, an off-invoice?

A. No, sir, no, sir. If we call it a merchandising, we have a separate contract for it, and it's payable by check at a later date.

Q. Well—oh, I see. This is for 9-inch fruit pies. The preceding one I read was for 8-inch; is that correct?

A. This is 9-inch fruit pies.

Q. 9-inch fruit pies. That's Exhibit 73. And on the same date you had a deal on 8-inch, in Exhibit 72. That's correct, is it not?

A. Yes, this is 8-inch fruit pies.

Q. And that one in Salt Lake City was 45 cents a case off invoice?

A. Correct.

Q. And this other one in Salt Lake City is 45 cents a case merchandising, on 9-inch fruit pies?

A. 45 cents a case merchandising, yes.

Q. Now, on your 8-inch pies, one of the competitors in the area is the Utah Pie Company, the plaintiff, isn't that a fact?

A. Correct.

Q. On your 9-inch pies, the Utah Pie Company is not a competitor?

A. To the best of my knowledge, they haven't gotten into that one yet.

Mr. Alioto: 74. July 20, 1961. Murphy presented deal programs for 8-inch fruit pies for all markets for the sixth sales assignment. August 21 to September 29, 1961. An explanation was given in each case, which included a review of the current program and the reasoning for the deals program for the sixth sales assignment.

"The programs follow: Los Angeles, Fresno, and Hawaii, 30 cents a case, advertising; northern California, 25 cents a case, advertising; Salt Lake 38 cents a case, off face; Boise, 38 cents a case, off face; Spokane, 30 cents a case, off face."

. . . . . .

[fol. 426] "Portland, 18 cents a case, off face; Spokane, 30 cents a case, off *case;* Butte, 30 cents a case, off face; Seattle, 48 cents a case off face." I forgot that one.

Mr. Billings: Thank you.

Mr. Alioto: "Alsaka, 25 cents a case, off face; Phoenix, 38 cents a case, advertising; El Paso, 18 cents a case, off face; San Antonio, 25 cents a case, off face; Dallas, 25 cents a case, off face; Houston, 25 cents a case, off face; Oklahoma City, 25 cents a case, off face; Memphis, Shreveport; Little Rock, 25 cents a case, off face; Omaha and Des Moines, 25 cents a case, off face; Kansas City, 25 cents a case, off face; St. Paul, 35 cents a case, off face."

Mr. Billings: Thank you.

By Mr. Alioto:

Q. You folks do not have a plant in the East, do you?

A. Well, we do have a co-packing arrangement in the midwest.

Q. Well, that was a rather recent arrangement, was it not?

A. Well, what do you mean by recent?

Q. Well, this complaint was filed in September of 1961. Did you have any co-packing arrangement in 1958?

A. No, we didn't have—

Q. So you only had the one plant in '58 in Torrance, California?

A. That's correct.

Q. Did you have this co-packing arrangement in 1959?

A. I'm a little foggy on the dates. Off the top of my head I would guess it's somewhere in the neighborhood of three years. I think that when you get into the minutes, it will show it.

Q. We will establish that definitely. But up until you made this co-packing arrangement—and that was with the Stokely Company—

A. Yes, sir.

Q. Stokely, Van Camp Company—the only packing plant you had was in Torrance?

A. Right.

Q. Now, how far did you go in your distribution, Mr. Murphy, so far as the country was concerned? Was it a national distribution out of Torrance?

A. Well, what period of time are you talking about, Mr. Alioto? It would make a difference.

Q. Would it be correct to say that for the most part you distributed your pies west of the Mississippi except for the State of Ohio?

[fol. 427] A. Are you talking about at the time we took Mrs. Lee's over, or later?

Q. No, I'm talking about 1960, '61.

A. 1960, I would say that the Mississippi River is a good dividing line. We don't go east of there with the exception of New Orleans and Memphis. For a period of time we were in Wisconsin, Chicago, and Minnesota. But that's a line that we use. It's not very straight, but I think those exceptions are possibly the only ones.

Q. Have you at any time in your organization ever prepared a map showing the price zones of the Carnation

Company and the price zones of the Pet Company and the price zones of the Morton Company?

A. No, sir.

Q. Have you ever seen such a map? A. Huh huh.

Q. You have to answer for the record. You said no?

A. The answer is no.

Mr. Alioto: Okay. We have no further questions, if your Honor please.

Cross examination.

By Mr. Billings:

Q. I'll just take one or two questions, Mr. Murphy. Mr. Alioto asked if you knew Mr. Wilson Hall, and you answered you didn't know him when he was with the Pet Milk Company and wrote the letter that he asked you about. Who is Mr. Wilson Hall?

A. Well, he's now with the Johnston Pie Company in Los Angeles.

Q. And that is a competitor of yours in Los Angeles?

A. Yes, sir.

Q. Mr. Murphy, in asking you about Plaintiff's Exhibit 70, Mr. Alioto asked you about advertising allowances, off the face allowances, and merchandising allowances; and you stated they all accomplished the same thing. Would you state to the jury what you meant by your answer that these various types of deals accomplished the same thing?

A. Well, actually what they do is to get the price to the consumer at a lower price. An advertising allowance to anybody in the grocery business, they would advertise pies at a substantially reduced price, so that all the different allowances that we have, accomplished the same purpose: get pies to the consumer at a lower price.

Q. When you grant an off the face of the invoice allowance, or a merchandising allowance, as distinguished from [fol. 428] an advertising allowance as such, do you get advertising from your customers?

A. If it's an advertising allowance, we get advertising.

Q. Would you get advertising when you—at a low price to the consumer when you give them an off the face of an invoice allowance?

A. Yes, sir. Most of the time they will advertise pies at a reduced price.

Q. Now, why don't you—let me put it the other way. Most of the deals as shown in the various sheets which have been introduced in evidence show that in California, for example, you've used an advertising allowance, while in Salt Lake City you've used an off the face of an invoice allowance. Why have you generally used one type in California and another type in Utah, when you get generally the same result, or they accomplish the same thing? That is, advertise pies at a lower price.

A. Well, markets are entirely different. For example, those two markets, in the Salt Lake market, we go off the face of the invoice, number one, usually to meet a competitive situation and because of the markup law that you have in Utah, which I believe is a six per cent law that the grocer has to sell merchandise at at least six per cent over cost, we go off the face of the invoice so that the retailers or the distributors can buy their pies at a price so that they can advertise them competitively. Now, I think the other market was northern California that you spoke about. We use an advertising allowance there to encourage advertising, and the trade there would almost without exception would advertise pies at a low price, so that the end result to the consumer would be the same. But because of the difference in markets, we have to go a different route.

Q. Mr. Murphy, on Exhibit 74, which is the exhibit relating to the sixth sales assignment marketing program on the second page which Mr. Alioto didn't read, it says: "8-inch fruit pies, northern California. Hogue discussed the northern California competitive situation with Olsen. It is the report that Morton has offered a deal of 55 cents per case on 8-inch apple pies and 35 cents per case on other

fruit pies effective August 14 through September 30. Hogue recommended that this deal be met for the period August 21 to September 29 by increasing our 25 cent deal to the 57 and one-half cents per case on apple and coconut custard, and 35 cents per case on other flavors."

Now, Mr. Murphy, do you remember that situation?

A. Yes.

Q. What does this minute mean?

A. Well, it means that we originally announced a 35 cent deal in northern California—I think that's the figure, [fol. 429] Mr. Billings—a 35 cent deal in northern California. After we had announced our deal in northern California, Morton announced a deal of 57 and one-half cents on apple. So that we immediately made a recommendation to our people to meet the Morton deal in northern California.

• • • • • • •

Q. Thank you. Now, I will show you Exhibit 74, which is a minute for July 20, 1961, and this is the one which Mr. Alioto read to the jury, which shows in various territories you had various amounts of deals and various types of deals during this particular Sixth Sales Assignment.

Would you explain, Mr. Murphy, why you would have different amounts of deals and different types of deals in different territories at the same time?

[fol. 430] A. Well, as I think I pointed out to Mr. Alioto previously, we looked at every market as a separate market. We don't make any attempt to throw a blanket over all the areas we operate in and say, "This is what has to be done in all areas."

Our field people send us information on competitive action, or what competitors are doing in each one of the markets, and we develop our program based on that information. And it would be unusual to find any two markets the same, and that is the reason why all of these are entirely different.

Q. Thank you. Now, there have been introduced in evidence certain price lists of the Carnation Company Simple

Simon pies. For example, here is Exhibit 41. Would you be able, Mr. Murphy, by looking at a price list, such as Exhibit 41, to tell the price at which Carnation Company was offering its pies for sale to its customers in that particular zone at that particular time, or at any particular date?

A. Well, effective February 18, this would be our price. We had two prices at that time, an ex-truck price and an ex-warehouse price. And this is Zone 1, California.

Q. That would be your list price, wouldn't it?

A. That's correct.

Q. But the actual net price to the customer could be determined only by also considering what deal was in effect at the time, is that right?

A. Whatever program was in effect at the time.

Mr. Billings: Excuse me just a minute. I want to get an exhibit, your Honor. Will you mark each one of these separately?

(Defendant Carnation's Exhibits C-B through C-F were thereupon marked for identification.)

By Mr. Billings:

Q. Mr. Murphy, I will show you what have been marked as Carnation Company's Exhibits C-B through C-F, inclusive, and ask you if these were prepared under your supervision?

A. Yes, sir.

Q. Would you state what these are?

• • • • • • • •

[fol. 431] A. I just didn't read far enough, I am sorry. Well, as I now read it further—and again I apologize—it is a summary of the deals or programs that we had in effect in the Salt Lake City territory for the period of January 1 through July 1, 1960, and it also explains off-the-face advertising allowances, and so forth.

Q. Now, were each of these, as I asked you, prepared under your supervision?

A. Yes, sir.

Q. Do they include all of the deals which Carnation Company had in effect for each of the territories indicated for the periods indicated?

A. Yes. We checked our records over very carefully, to be sure we included everything.

* * * * * * *

Voir dire examination.

By Mr. Alioto:

Q. So far as these exhibits are concerned, did you really prepare them, Mr. Murphy, or were they prepared by lawyers? What is the real fact about it?

A. My girls prepared them.

Q. What did you tell them to do?

A. Just exactly what is on here. We got the information as to what our attorneys wanted; they passed it on to me, and we got our staff to dig into the records and to dig out the actual information.

Q. Now, in each case where you have, for example, on the Salt Lake market "O.F.," that means "off face"?

A. Yes, sir.

Q. And there is otherwise an explanation for each of the things?

A. It is explained on here.

Mr. Alioto: We have no objection, if your Honor please, to these going into evidence.

[fol. 432] The Court: Received.

(The documents marked Defendant's Exhibits C-B through C-F for identification were received in evidence.)

Cross examination (continued).

By Mr. Billings:

Q. Do you know what brand of frozen fruit pies the Stokeley Van Camp Company puts out?

A. Yes. They—I know—I know their one particular label. They are what we term "private label packers." They market a Pictsweet Pie, but they also make many other private labels, and I wouldn't know what they are, or anything else.

Q. Do you compete with Pictsweet label?

A. We compete with any pie on the market.

The Court: Are you through with this witness?

Mr. Billings: May I have just a moment, your Honor. I think maybe most of the rest we will reserve for part of our case in chief.

The Court: Well, let's get going on it, whatever you want to do.

Mr. Billings: I think that is all, your Honor.

Redirect examination.

By Mr. Alioto:

Q. Mr. Murphy, your counsel interrogated you about Plaintiff's Exhibit 74, which set out a number of deals in various areas. This reads as follows:

"Murphy presented deals programs for 8-inch fruit pies for all markets for the Sixth Sales Assignment, August 21 to September 29, 1961."

Then this follows:

"An explanation was given in each case, which included a review of the current program and the reasoning for the deals programs for the Sixth Sales Assignment."

The program follows.

• • • • • • •

[fol. 433] Q. Do you claim that this 38-cent price cut here in Salt Lake City was for the specific purpose of meeting the competition of this plaintiff?

A. No. That is going back quite a ways. I wouldn't check my memory that far. It was meeting somebody's competition.

Q. You don't have your notes that would—

A. They are just—

Q. (Continuing) —that would tell you whether or not it was the plaintiff, is that correct?

A. That's correct.

Q. You would have no way of knowing at this moment whether or not it was the plaintiff or somebody else you were meeting?

A. Whatever I said would be an assumption.

Q. Did you participate, incidentally, in the making of the forecasts or the budgets for the Salt Lake City area?

A. Well, the forecasts that I make is for the entire United—I am sorry, for the entire area that we operate in. We don't make any attempt, or at least I don't make any attempt, to break it down by territory. I say that we are going to sell "X" number of 8-inch cases in all markets, "X" number of cases of 9-inch "X" number of cases of creams, and so forth.

Q. Were you aware of the fact, Mr. Murphy, that you [fol. 434] were forecasting actual losses in the Mountain States area in, say, 1959, that one I just read?

A. Of course, P & L is not my responsibility and I am never involved in it.

Q. Mr. Murphy, my question is: Were you aware, at the time you did anything in connection with those budgets, that the company, the Carnation Company, was actually forecasting sales below cost in this area?

A. I wouldn't have any idea, because when I forecast, I am forecasting cases, Mr. Alioto.

Q. Is your answer "no" that until this trial you were not aware of the fact—

A. That is correct.

Q. (Continuing) —that your company forecasts predicted, or forecast, or budgeted, sales below cost in the Mountain States area?

A. That is correct.

Q. Incidentally, what is the National F. F. Packers Association?

A. That is the National Frozen Food—well, I guess there's two of them, National Frozen Food Packers Association—that is the packers—and then there is another association, the distributors. Those are the only two I know in the frozen food.

• • • • • • • •

Mr. Alioto: We will offer this in evidence, if your Honor please, document dated June 20, 1957.

Mr. Billings: Will you give me the index number on that?

Mr. Alioto: Yes. It is Index No. 80.

Mr. Billings: Excuse me. Without prolonging this, your Honor, I make the same objection and request with respect to this page out of the minutes.

[fol. 435] The Court: Same ruling.

Mr. Alioto: Under the heading of "Policies, Reporting Production Data to National F. F. Packers Association."

By Mr. Alioto:

Q. Now, the "F.F." stands for "frozen foods" I take it?

A. I believe that is correct.

Mr. Alioto: June 20, 1957, a Carnation document, states as follows:

"Halgren presented a request from the National Frozen Food Packers Association requesting data of 1956 production tonnage of frozen pies. It was asked, as a policy ruling, as to whether or not we should furnish this data. It

was decided that the production figures would be presented provided the Association promised participation by at least two other packers."

• • • • • • •

By Mr. Alioto:

Q. Let me ask you whether or not, after that decision to furnish those figures on that proviso was made, do you know whether or not those figures were, in fact, furnished?

A. I wouldn't have any idea. We are not members, we never were members, and why should we give anybody figures?

Q. That is the question I am trying to get at, too. There [fol. 436] was a decision made to give them these figures on a certain proviso. Do you know whether or not the proviso was met?

A. I wouldn't know.

• • • • • • •

Mr. Alioto: We will offer at this time, if Your Honor please, our exhibit next in order, which is price lists of the Pet Company for the period of 1956 down through the period involved in this litigation.

The Court: Any objection, Mr. Lamb? Price lists of Pet.

Mr. Alioto: Pet Company price lists, for the purpose of matching them with these other price lists at a later junction.

Mr. Lamb: May I ask, Mr. Alioto, if these represent all the price lists and all the off-invoice allowances?

Mr. Alioto: Yes, all you gave us, as far as I know.

Mr. Lamb: If these are all, subject to check, your Honor, I have no objection.

The Court: Received.

(The documents marked Plaintiff's Exhibits Nos. 75 and 76 for identification were received in evidence.)

• • • • • • •

[fol. 437] MYRON K. RIGBY called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Rigby, would you be good enough to state your full name for the record, please.

A. Myron K. Rigby.

Q. And where do you reside, Mr. Rigby?

A. 2636 Jasper Street.

Q. What is your present business or occupation?

A. Production Manager of the Utah Pie Company.

Q. How long have you worked in the Utah Pie Company, Mr. Rigby?

A. Since I was in grammar school. We worked every night after school.

Q. Weekends, too?

A. Yes.

Q. How about the vacation periods?

A. All the vacations.

Q. How old are you now?

A. Twenty-four.

Q. What kind of education did you have, Mr. Rigby?

A. High School.

Q. High School. After High School, what did you do?

A. I started to work full time at the bakery.

Q. Full time. At that time it was not in the frozen pie business was it?

A. No.

• • • • • • •

Q. And would it be correct to say that from that time down to the present time that you have worked every year full time in the Utah Pie Company, the plaintiff corporation?

A. No.

Q. Why not?

A. May of 1958 until November of 1960 I was in Central America on a mission for the Church of Jesus Christ of Latter-Day Saints.

Q. Except for that period of time have you worked full time at the plant of the Utah Pie Company?

A. Yes.

Q. You are presently—

[fol. 438] Mr. Lamb: If your Honor please, I object to this line of questioning. What is the relevancy of a man's religion to this case?

The Court: None.

Mr. Alioto: I didn't say religion was anything. I just wanted to know whether he was there.

The Court: That reference is stricken from the record, ladies and gentlemen.

By Mr. Alioto:

Q. You are familiar at the present time, are you, Mr. Rigby, with the production facilities of the Utah Pie Company?

A. Yes.

Q. And you are familiar with what those production facilities were during the period of time from 1957, '58, '59 down to date?

A. Yes.

Q. Would you be good enough to tell us what capacity, the production capacity of the Utah Pie Company in the year 1961.

A. Per day or per year?

Q. Well, give it to me first on a per-day basis.

A. 40,000 pies a day.

Q. 40,000 pies a day. Would that be for an eight-hour shift or two eight-hour shifts, or three eight-hour shifts?

A. That would be three eight-hour shifts.

Q. That would be the total capacity then?

A. Yes.

Q. How many would that be on the first eight-hour shift?

A. 12,000 frozen pies plus our baked pies and cream pies.

Q. The second shift?

A. 14,000 frozen pies.

Q. And the third shift would be 14,000 frozen pies, too, I take it?

A. Yes.

Q. The difference between 14 in the second and 12 in the first would be because of your freshly baked products, is that right?

A. Yes.

Q. What freshly baked products does the Utah Pie Company handle?

A. Apple, pineapple, cherry, berry, raisin, mince, baked pies for the retail stores and for restaurants.

Q. Have you made a calculation for us, on the basis of 40,000 pies per day, how many you would produce on the five-day week?

A. 200,000 pies.

Q. And can you, on the basis of that 200,000 pies per week, convert that to cases? That is six pies per case. Ap- [fol. 439] proximately what is that?

A. Between 33 and 34,000 cases.

Q. So that would be 33 or 34,000 cases per—

A. Per week.

Q. Per week of productive capacity. And if you do the multiplication for us, approximately how many pies then do you have a production capacity for in your plant for an entire year?

A. One and one-half million cases.

Mr. Alioto: We have no further questions, if your Honor please.

Cross examination.

By Mr. Lamb:

Q. Mr. Rigby, how many hours do you work in a year?

A. Per year, I couldn't say.

Q. Well, do you work eight hours a day or ten hours a day?

A. More than eight hours every day.

Q. Seven days a week?

A. Six and a half.

Q. Assuming that you worked ten hours a day, seven days a week, that would be 70 hours a week, is that correct?

A. Yes, according to that, assuming that, yes.

Q. And that, on the basis of 52 weeks a year, would be about 3500 hours a year, is that correct?

A. I won't say. If you say that is correct—

Q. Approximately what is your salary? How much do you get paid?

A. Last year I believe it was about $12,000.

* * * * * * *

[fol. 440] Cross examination (continued).

By Mr. Schafer:

Q. There was talk earlier, Mr. Rigby, in this trial about the Safeway business, and you, I take it, are in charge of production, is that right?

A. That's right.

Q. Does that include being in charge of packaging?

A. I am in charge of the packaging end of the frozen pie into the corrugated box.

Q. Yes. And I take it it takes some sort of a machine to do that, is that right?

A. No.

Q. It doesn't take a machine?

A. No.

Q. You put the pies in the box by hand?

A. We put the pies in the corrugated box by hand.

Q. I am talking about putting the pies in the box that the consumer sees in the retail store.

A. That is done by machine.

Q. And it takes some particular kind of machine, is that right?

A. There are several on the market, yes.
Q. And you have one kind?
A. Yes.

• • • • • • •

By Mr. Schafer:

Q. We were speaking about the carton, Mr. Rigby, for the Safeway products, is that correct, do you recall?
A. Yes.
Q. And I was asking you whether or not your company was in a position to use the Safeway carton.
A. At the present time, no.
Q. Were they ever in a position to use the new carton when Safeway shipped it?
A. Not the new carton, no.
Q. So that's the reason why you lost the Safeway business in 1962?
A. I don't believe that's the reason.

Mr. Alioto: I have no objection.
Mr. Schafer: Morton's 10, 11, and 12, your Honor, I'm offering in evidence.
The Court: Received.

(The exhibits marked Defendant Morton's Exhibits M-10, M-11, and M-12 for identification were received in evidence.)

Mr. Schafer: This letter, Mr. Rigby, is dated June 1, 1962. It's from Mr. Allen W. Young who has been identified formerly as the manager of the Safeway Bel Air busi- [fol. 441] ness. It's dated to Mr. Gaylen S. Rigby. And it reads:

"Caption: Pumpkin and mince pies.

"Dear Mr. Rigby: Will you be in a position to use our carton with a Marra-lock bottom-edge closure this coming pumpkin and mince season?"

There's a handwritten note on the letter which says:

"Sorry, no can do."

A letter dated June 15, 1962, from M. O. Rigby.

By Mr. Schafer:

Q. Could you identify M. O. Rigby, sir?
A. That's the vice president of Utah Pie.

Mr. Schafer: Addressed to Mr. Allen W. Young. It reads:

"Dear Mr. Young: At the present time we are not equipped to use the cartons with the Marra-lock bottom-edge closure. We are gradually changing our stock to the Marra-lock bottom-edge closure as our inventory decreases on the old style. We hope to have this change complete for the season of 1963.

"For your information, we are equipped to take care of your requirements this fall if you have the old style cartons for pumpkin and mince pies."

A letter dated June 18, 1962, from Mr. Allen W. Young, addressed to Mr. M. O. Rigby.

"Dear Mr. Rigby: Thank you for your letter of June 15. We have no pumpkin or mince pie cartons in the old style and, therefore, will apparently be unable to purchase any pies from you this year.

"We are puzzled how you can 'gradually change your stock to the Marra-lock bottom-edge closure' if you do not have the machine parts to use it?"

By Mr. Schafer:

Q. Is it your testimony, Mr. Rigby, did I understand you, that the reason you lost the pumpkin and mince business on Safeway was not because you didn't have the right machine for the box?

[fol. 442] A. According to those letters, yes.

Q. Yes. Now, you testified, sir, as to the capacity of your plant; and my question is, sir, did you compute down time in that, for your machines?

A. Yes.

Q. Do you know of any plant in the country that operates on three shifts a day in the pie business?

A. I was told Pet-Ritz did.

Q. But you don't know of any?

A. I've never seen them run three shifts, no.

Q. Who told you that Pet-Ritz ran three shifts? Your attorney?

A. No.

Q. Who?

A. A man by the name of Al Smith.

Q. Al Smith. And when did he tell you that?

A. 1961.

Q. And what plant was he talking about there?

A. Pet-Ritz.

Q. Where?

A. Fresno.

Q. How much storage space, freezer space, do you have in your plant?

A. We have a—one freezer on the inside, which is 30 by 16. I believe the other one is 30 or 40 by 80. I'm not sure of the measurements.

* * * * * * *

Ross K. Rigby, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Rigby, what is your name?

A. Ross K. Rigby.

Q. And where do you reside?

A. In Salt Lake City.

Q. What is your present business or occupation?

A. I'm plant engineer and purchaser of packing products for Utah Pie Company.

Q. What's your relationship to the Rigby that just took the stand?

A. I'm his older brother.

Q. How long have you been working down at the Utah Pie Company?

A. Since I was ten years old.

Q. How old are you now?

A. Twenty-seven.

Q. Did you go to school?

A. Yes.

Q. Where?

A. Here in Salt Lake City at a grammar school, junior high school, and high school. One year at the University of Utah, one year at trade school.

Q. What principally are your duties down at the Utah [fol. 443] Pie Company as of the present time?

A. Purchase, maintain, design, and modify all machinery, purchase all paper, packaging products.

Q. Now when did you start working full time at the Utah Pie Company?

A. In 1956.

Q. When did you start working part time?

A. Well, I started part time at age ten. Spent two years in the Army, '54 to '56.

Q. In other words, except for that spell in the Army, you have been continuously working down at the Utah Pie Company; is that correct?

A. Yes, sir.

Q. Now then, so far as machinery is concerned—first of all, can you tell us whether or not during the period up until 1961, was there any other pie manufacturing plant located in the Intermountain Area?

A. There are none.

Q. Utah Pie is the only one—was the only one; is that correct?

A. That's right.

Q. Do you know a man named Boyd F. Schenk of the Pet Milk Company?

A. No, I don't.

Q. Do you recall a visit in or about June 23 of 1960 from Dick Dowell of Cannery Sales Company and Bill Elgrett of the Utah Wholesale Grocery Company?

A. Yes, I do.

Q. Was there a third man with them?

A. Yes.

Q. Whom that gentleman represent that he was?

A. A broker from Oregon or Washington.

Q. Is that the substance of what he told you?

A. Yes. He—

Q. Now, on the basis of what he told you, did he ask you to show *you* the plant?

A. Yes, he told me that in order to properly sell his prospective customers, he had to sell us in turn to them. And he asked in detail the engineering portion of the plant, our freezing capacities, about the production ability of each piece of equipment that we have.

Q. Did he say anything at that time in substance or effect—or, to the effect—in substance to the effect that he was employed by the Pet Milk Company?

A. No, he didn't.

Q. Until this trial started, did you know that he was Boyd F. Schenk of the Pet Milk Company?

A. I did not.

Q. What area did he claim he wanted to be a broker for?

A. He listed it specifically as the Northwest, which I take to be Washington and Oregon.

Q. But he said the Pacific Northwest? Is that it?

[fol. 444] A. Right.

Q. Now, tell the Court and the jury the nature of the questions he asked you, and tell us what you told him and what you showed him in that plant.

The Court: Now, before you start on that, I think, Mr. Alioto, you misspoke yourself. Your question was: Did he ask you to show you the plant.

Mr. Alioto: Oh, I'm sorry. Thank you, Judge.

By Mr. Alioto:

Q. Did he ask you, Mr. Rigby, for you to show him the plant?

A. Yes, he did.

Q. And this was after he told you that he was a broker from the Northwest?

A. Yes.

Q. Now, tell the Court and jury in detail the nature of the questions he asked you, what you told him, and what you showed him at his request.

A. Well, beginning at our production line, he asked us what our daily capacities were; could we handle additional business, which he hoped to sell in the Northwest. We explained to him the operation of our machinery, the new mechanical system we had of handling our product through conveyor system to eliminate all handling. Our plate freezer, the type of packaging we used on this plate freezer to carton our product; how many people it required in our line to do this; how much storage space we had; a description of our new live storage system that we have in our freezer; and just basically, how many pies we could store, how many we could keep on hand; if we could gain the business that he hoped to sell for us in the Northwest.

So I gave him as detailed a knowledge as I could to assist him in selling his new customers on our ability to produce.

Q. Mr. Rigby, I take it you folks have some private label business that you pack in your plant?

A. Yes, sir, we do.

Q. And you have your regular Utah Pie label business that you pack in the plant, too?

A. Yes, sir.

Q. Do you have an opinion, Mr. Rigby, based upon your experience in this plant over the years, as to whether or not in terms of speed of going through the machines, it makes any difference whether you're packing private label or whether you're packing regular label? First of all, do you have an opinion?

A. Yes, I do.

Q. Now, would you be good enough to state what that opinion is?

[fol. 445] Mr. Schafer: May I have the question read? I didn't understand the question, your Honor.

The Court: Read it, Mr. Reporter.

(Question read.)

Mr. Schafer: I don't see the relevance of that, your Honor.

The Court: Overruled.

The Witness: Do you want me to answer now?

Mr. Alioto: Yes.

A. Yes, I have an opinion.

Q. And what is the opinion?

A. Mechanically there is absolutely no difference whatsoever.

Q. So far as speed of production is concerned, is there any difference, relating to the machinery itself?

A. No, there is no variance.

Q. Now, there have been introduced into evidnce on the cross-examination of your brother three letters from the Safeway Company, the first of them being—the first of them is M-10. It is a letter dated June 1, 1962, to Gaylen S. Rigby. That is not your brother, is it? That is your cousin Gaylen?

A. That's right.

Q. And your cousin Gaylen is the one who is in charge of sales at the plant?

A. That's right.

Q. You yourself have nothing to do with sales?

A. That's right.

Q. Is that correct? This letter reads as follows:

"Dear Mr. Rigby:

"Will you be in a position to use our carton with the Marra-Lock bottom edge closure this coming pumpkin and mince pie season?"

And your answer as you recall, was:

"At the present time we are not equipped to use the cartons with the Marra-Lock bottom edge closure."

In the event that you had a sufficiently large Safeway order on fruit pies, as well as just Christmas time and [fol. 446] Thanksgiving for mince and pumpkin, if you had a sufficiently large order of fruit pies for Safeway, what, mechanically, would you have to do in your plant in order to use the Safeway carton with the Marra-Lock bottom edge closure?

A. We would only have to add a set of closing plows.

Q. I didn't hear that. Say that again.

A. We would have to add a set of closing plows. This is the mechanical apparatus which folds the two ends of the carton together.

Q. Yes.

A. And locks them in.

Q. How much would it cost to do that?

A. Approximately $1400.

Q. How long would it take to put that in?

A. Well, installation would be about eight hours.

Q. And then you would be ready to go?

A. That's right.

Mr. Alioto: We have no further questions.

Mr. Schafer: Could I say one thing. We have one problem with three attorneys here. We recognize your Honor wants us only one, to cross-examine, and we want to accommodate that. I wonder if we could have a short minute or two to see what questions ought to be asked?

The Court: I don't think the cross-examination up to date has been onerous at all.

Mr. Schafer: We will try not to make it so.

The Court: And I haven't interfered with anybody who wanted to ask any questions. Why don't we go along like we have been doing.

Mr. Lamb: We want to honor your wishes, your Honor.

The Court: Thank you. If it gets burdensome to the witness, we will take it over.

Cross examination.

By Mr. Lamb:

* * * * * * *

By Mr. Lamb:

Q. Mr. Rigby, you testified, with respect to a visit made by an individual from the Pet Milk Company into your plant. Would you be able to identify him if he testified here as a witness?

A. No, I couldn't.

[fol. 447] Q. You couldn't identify him?

A. No, I couldn't.

Q. Do you have any recollection whatsoever as to what he looked like?

A. No. What brings it specifically to mind is the gentlemen he was with were local fellows, and I had met them.

Q. Did they arrange the visit, or did Mr. Schenk arrange it?

A. I don't know. The first time I saw Mr. Schenk he was inside our plant.

Q. Mr. Schenk accompanied these two gentlemen?

A. That's right.

Q. And they introduced Mr. Schenk to you?

A. I was not introduced.

Q. You were never introduced?

A. Not that I recall.

Q. But yet he had some conversations with you?

A. Definitely.

Q. Do you remember the conversations?

A. Yes. Because of the mechanical nature of the questions he wanted; this was my field.

Q. Was he a short man?

A. I can't recall what he was.

Q. You don't even know whether he was short, medium height, or tall?

A. That's right.

Q. Did he look like a detective?

A. He was dressed in a suit.

Q. He was dressed in a suit. Did he look like a Svengali?

Mr. Alioto: If your Honor please—

A. Can you describe that?

Mr. Alioto: I object, if your Honor please.

The Court: Sustained.

Mr. Alioto: If there is going to be an argument as to whether Boyd Schenk was in the plant, it seems to me he can reach it another way.

The Court: Yes. Do you claim that he wasn't in the plant, Mr. Lamb?

Mr. Lamb: No, your Honor, I don't.

The Court: Well, of course not.

Mr. Alioto: Okay.

By Mr. Lamb:

Q. How long was he in the plant?

A. Oh, as near as I recall, it might have been, in the back [fol. 448] plant—I don't know how long he spent in the office—anywhere from 35 to 40 minutes.

Q. Thirty-five to 40 minutes.

A. This is just as I recall. I had to work while he was there, so I didn't walk around and watch him.

Q. And you told him all about the speed of your machines?

A. The mechanical apparatus, yes.

Q. The mechanical aspects of it?

A. Yes.

Q. Have you been shown a report by your counsel made by Mr. Schenk with regard to this visit?

A. The only thing I know of the visit is the letter that has been read as evidence.

Q. Have you seen the letter?

A. I have heard it read. I have not read it myself.

Q. Do you recall what it said?

A. In substance, yes.

Q. Was it complimentary or derogatory to the Utah Pie Company?

A. Well, at times it was both.

Mr. Lamb: May I have the exhibit?

Mr. Alioto: Yes.

By Mr. Lamb:

Q. Mr. Rigby, I hand you Plaintiff's Exhibit No. 38 and ask you just to refresh your memory and look at several of those paragraphs. Have you read them? Is that what was read in court the other day?

A. Yes. This is the document.

Q. Were you present when that document was read?

A. Yes, I was.

Q. Will you pick out the derogatory paragraphs.

A. Oh, "the plant was somewhat cluttered."

Mr. Alioto: I object, your Honor. The letter speaks for itself. The witness hasn't had it, and I don't see the point, the relevance of it.

The Court: I think so, Mr. Lamb. All through this trial I have prevented all of you from having the witness read to us.

Mr. Lamb: I agree, your Honor. May I read it to him, then?

The Court: Yes, surely.

Mr. Lamb: And to the jury.

The Court: Surely.

[fol. 449] Mr. Lamb: I hope my stentorian voice doesn't get too loud, my elocution.

"Management—The business is owned and managed by William Rigby. His son, Galen Rigby, is responsible for sales. A brother of the elder Rigby seemed to be plant superintendent."

By Mr. Lamb:

Q. Who is the plant superintendent?

A. At that time it would have been my father.

Q. "Products—Frozen pies—baked unfrozen pies and specialty cakes. They make a baked cream pie but no frozen cream pies.

"Marketing—Baked pies and cakes are distributed locally. Frozen pies are sold in the Intermountain area and in California. They have no outlets in the Pacific Northwest but are desirous of some."

Mr. Rigby, Mr. Schenk did ask about the Northwest then?

A. Yes, he did.

Q. Maybe he was thinking about quitting the Pet Milk Company and getting—

Mr. Alioto: I object to this commentary on a rather serious matter. I make a motion to strike it.

The Court: Certainly what you said has no basis in the proof here, Mr. Lamb, and that remark is stricken.

Mr. Lamb: I apologize, your Honor.

"The building is of recent block construction with offices and a retail sales room, main production area used also for dry storage and a newly built zero storage room. The son indicated they had an investment of $300,000."

Are you the son he was referring to?

A. In talking about the investment, that must have been Gaylen.

Q. That must have been Gaylen.

"Equipment—Pies are produced on a straight line Colborne manual pie machine, printed cartons are closed in a

Marapak H, and pies are conveyed to an Amerio—" is that it? "Amerio"?

[fol. 450] A. Amerio.

Q. "—Amerio plate freezer. Hot starch method is used with steam kettle for starch which is poured over fruit in tubs. Dough is conventionally mixed."

Then it goes on with capacity, housekeeping and sanitation.

"Sanitation—While the plant was somewhat cluttered, housekeeping and sanitation appeared entirely satisfactory."

And then it goes on:

"Quality—Fruit supply I saw in the plant was all frozen. Apples were steam blanched Pippins from California, boysenberries were Setastopol IQF, cherries were 5 plus 1 sugar packed with Utah cherries. I did not see any peaches but was told they buy California Elbertas."

Then he says:

"Conclusion—From a competitive point of view Utah Pie Company has the following advantages:

"Low overhead . . .
"Non-Union labor force.
"Freight advantage into intermountain markets."

Then he lists the disadvantages:

"Less favorable purchasing position due to volume.
"Higher fruit costs due to lower volume . . .
"Operation inefficiencies.
"Lack of high-speed automatic pie machine."

And then he lists some of the things—as it states here:

"Some of these are quite easily remedied . . ." such as hot starch method, slower freezing, lack of technical quality control personnel.

• • • • • • • • •

—

[fol. 451] By Mr. Lamb:

Q. Let's put the question this way: Did the Safeway people ever communicate any of these items that needed to be remedied to you?

A. Yes, I recall one or two items. There was a question about quality control.

Q. And did you improve it?

A. To their satisfaction. They bought our pumpkin and mince for two years.

Q. You improved it as a result of a visit by a Safeway man to your plant?

A. What they required was a bunch of paper work, which didn't make any difference in the pie that ran through the machinery, except they wanted to know what we ran, when we ran it.

Q. Mr. Rigby, isn't it a practice of the Safeway people to visit your plant and give it a very careful inspection before they enter into a contract with you?

A. That's right.

Q. When the Safeway people did visit your plant, did they call any of these items to your attention?

A. Would you read them one at a time?

Q. Yes, I will. "Hot starch method instead of instant."

A. As I recall, they didn't say anything derogatory about that.

Q. "Slower freezing."

A. They didn't say anything about that either, that I recall.

Q. "Lack of technical quality control personnel."

A. Yes, this was mentioned.

Q. "Storage of mixed fruit in 55-gallon non-stainless drums prior to being used."

A. They might have talked to the superintendent about that. I didn't.

Q. "Fruit mixture at too high temperature prior to use."

A. They didn't mention anything to that effect to me, either.

[fol. 452] Q. "No covers on storage vessels or filler hopper."

A. That must have been discussed with someone else. I don't recall them ever saying anything.

Q. "No metal traps in lines"

A. I don't even know what they mean by that.

Mr. Alioto: If your Honor please, is it clear that he is not reading from a Safeway letter, but from a Pet Milk letter? The witness says they must have discussed that with somebody else, as though there was a discussion.

Mr. Lamb: Your Honor, this document is in evidence.

The Court: You are not having any trouble with me about that.

By Mr. Lamb:

Q. When was the request made by Safeway to improve your quality control?

A. I don't recall who the man was. He came when we started to produce the pumpkin and mince. He was their quality control man, and I couldn't name him by name, except that he was a very gracious man, very polite, and very congenial to work with. He suggested that we designate someone in our plant to handle the paper work that was required by Safeway while we were in production of the product.

Q. How many inspections have been made by Safeway of your plant?

A. By quality control people or by just Safeway employees?

Q. By quality control people primarily.

A. Three that I recall. Two were simultaneously conducted by two different individuals, as I recall.

Q. And they did, in fact, find some of the things that I read to you here to need remedying, correct?

A. I don't know. They never asked me about them, except for the quality control was mentioned.

Q. Except for the quality control.

A. That's right.

• • • • • • •

Q. Can you give me the names of the companies that were visited?

A. No, I can't. I wasn't there.

Q. Were they competitors of the Utah Pie Company?

A. As I recall, they weren't in our market. By that, I mean the Intermountain area. My uncle, Mr. Rigby, has made periodic vacation trips to California. They have some buyer friends there that are also in the pie business, and I believe he has been through their plants.

• • • • • • •

[fol. 453] Cross examination (Contd.).

Q. Mr. Rigby, do you have an opinion as to whether or not, if you are making a crust which is a thinner crust than another crust, you have to send the pie through machines slower?

A. You definitely do not.

Q. So that if Mr. Kitchin testified that in order to get a three-ounce crust through a machine, rather than a four-ounce crust through, he would have to send the pie through slower, do you disagree with that?

A. Definitely I do.

Q. Do you know what the capacity of the company's storage facilities are, frozen storage facilities?

A. Oh, just off hand, without a pencil, I would say we have got about 48,000 cubic feet of refrigeration storage.

Q. What does that add up to in dozens of pies?

A. Oh, with fruit, in excess of four semi-loads, or five, just figuratively speaking. Give me a pencil and I can figure it.

Q. I am willing to take your testimony. You mean four or five what we have been calling truck loads?

A. Yes. What you call truck load lots. Besides our fruit storage that we have to have for production.

Q. That would be different than your freezer storage?

A. No, that is all in the same room.

Q. Well, you have room for four or five truck loads?

A. And adequate storage for production facilities.

Q. Do you have a coding machine yet?

A. No, we have no use for one.

Q. Safeway wanted you to have one, is that correct?

A. Mr. Young did mention it, yes. But we also packed two years without it. He was completely satisfied.

Mr. Schafer: Well, I move to strike that, your Honor. It is not responsive. It is also hearsay.

The Court: It is stricken.

Q. The fact of the matter is that Safeway wanted you to install a coding device and you didn't do it, is that correct?

A. They suggested that we do.

Q. They asked you to, didn't they?

A. They suggested that we do.

Q. They didn't ask you to?

The Court: Well, that's argumentative.

[fol. 454] Mr. Schafer: I am trying to get an answer to the question, yes, or no.

The Court: He gave you a pretty good answer. He said, yes, Young suggested it.

Redirect examination.

By Mr. Alioto:

Q. You were asked about a visit you made to a plant, and you said, yes, you went down to the Ward Baking Plant. When you went down there, did you tell them who you were? Did you give them your name?

A. I was introduced as Mr. Rigby from Salt Lake City.

Q. And you asked to see the plant, did you?

A. Yes, I was just specifically—one purpose was to look at their frozen cream room. We were buying a piece of machinery from a man that supplied them with a piece of machinery. He introduced me and said what I wanted, and

they took me into this room, and I saw this piece of machinery operate.

Q. And you identified yourself as a Rigby from the Utah Pie Company?

A. I don't recall that I was introduced from Utah Pie or not.

Q. Did you tell him you were interested in buying this competitive machine?

A. Well, what we were buying was an ice cream freezer.

Q. And did this Ward Bakery—Is this the machine you looked at, the ice cream freezing machine?

A. This is what I saw.

Q. Well, you don't use this ice cream freezing machine in making pies up here, do you?

A. Yes, we do.

Mr. Alioto: I don't understand these laughing boys, if your Honor please. I can't understand this kind of business that goes on here.

By Mr. Alioto:

Q. Now, then, you were asked whether or not your uncles ever went to any plants, and you mentioned some in California. Did they go in disguised as brokers from the Northwest?

A. They were invited by people who knew who we were and sold us products.

Q. Okay. Now then, something was said about a coding device here, Mr. Rigby. Or, first of all, on quality control. See if we can get a laugh out of them on this, now. On this quality control business, you did state that there was a [fol. 455] Safeway man who came to your plant?

A. That's right.

Q. You didn't fix the time, approximately when was it?

A. As I recall, it was in September, about the time we began production in the pumpkin pie.

Q. And were there one man or two men?

A. The first visit there was one man. As I recall, I believe it was the second visit that there were two.

Q. Did he tell you to change anything other than your bookkeeping setup or your—

A. Specifically to me, he didn't.

Q. Did he ask you to make any change at all in any of the machines under your jurisdiction?

A. No, our production machinery was satisfactory.

Q. And they said it was satisfactory?

A. He told us that our plant was the cleanest plant he had been in.

Q. Now then, this coding device. Just what exactly is that?

A. It's a little wheel that can change the numbers. It has what you call a slug that you can extract the slug, put in an a.m. or a p.m. slug, so that you can determine whether you ran in the morning or the afternoon, when this product passed through the machine. And it also has a dating slug, so that you can date the day and the month. And all this does is make an impression in the wax carton as it passes through the closing device. So that at a later date if they have problems with their pie, they can get out and read the code and come back to our plant and say it was run in the morning of Friday the 13th or something.

Q. And that's the only purpose of the coding device?

A. That's the only purpose.

Q. Incidentally, is that some kind of an expensive installation?

A. Oh, I'd say maybe eighty or ninety dollars. Something of this nature.

Q. Eighty dollars?

A. It's not expensive.

Q. How long does it take to put a coding device on, if you have the Safeway business, say, on the fruit pies, instead of just the Thanksgiving and the Christmas business?

A. You remove the bolt and mount it up and screw it back down.

Q. That's it?

A. Yes. It's driven by the product traveling against it.

[fol. 456] Mr. Alioto: Okay. We have no further questions.

Cross examination.

By Mr. Lamb:

* * * * * * * *

Q. But did you get the Bel Air business on pumpkin and mince in the fall of 1960?

A. Yes, we packed for them.

Cross examination.

By Mr. Schafer:

Q. Mr. Rigby, I did not understand what you told Mr. Alioto about the purpose of the coding device.

A. The purpose of the coding device is to label each product traveling through the plant as to whether it was made in a.m. or p.m. and on what date.

Q. Well, why does anybody want to know that? That's the question.

The Court: They want to know how old the pies are?

Mr. Schafer: I don't think that's right, sir.

The Witness: We would never want—I can't answer that because we've never had a reason to have one. I don't know why they want it.

By Mr. Schafer:

Q. Isn't it true, Mr. Rigby, that a manufacturer or buyer wants to know that in order to trace out the production line if something goes wrong with the production, so that if the quality goes wrong, he can know when it went wrong, [fol. 457] so he can trace out what the problem was?

A. If it was produced three weeks ago, there's nothing you can do about it.

Q. Well. But suppose it was produced more recently. Isn't that the purpose of a coding device?

A. It could be the purpose.

Q. Can you think of any other reason?

A. To tell how old the product is.

Q. Who cares about that.

A. I don't know. Who cares about the other question you asked? I mean, it's irrelevant to me.

Q. As a manufacturer, you don't care about knowing if one of your pies goes wrong in terms of quality, you don't care when it was produced? You don't care about tracing that out, finding out what the problem was?

A. If it's been passed two or three or four days, six months, there's not much you can do about it, except don't let it happen again. And we do this on our own.

Q. How are you going to trace it out, if you don't know what happened in the first place?

The Court: Well, this is argumentative. I think he's answered your question.

• • • • • • •

Mr. Alioto: If your Honor please, yesterday we offered into evidence a market survey report by the Market Research Corporation of America. At that point it was admitted on as to Pet Company, which ordered the market survey. I'd like at this time to read the deposition of Mr. H. Larkin Osborn, who is a vice president of the company which prepared this report. The purpose of reading this deposition is so that we might offer this market report as against everybody, and not just against Pet as an admission. So I'd ask at this time, if your Honor please, that the deposition of Mr. H. Larkin Osborn, taken on September 7, 1962, in Chicago be opened.

The Court: It may be. It may be published.

• • • • • • •

[fol. 458] "Mr. H. Larkin Osborn, having been first duly sworn, deposeth and saith as follows:

"Direct examination.

By Mr. Aliotó:

"Question: Will you be good enough to state your full name for the record, please, Mr. Osborn?

"Answer: My full name is H. Larkin Osborn.

"Question: Where do you reside, sir?

"Answer: Wilmette, Illinois.

"Question: What is your business address.

"Answer: 425 North Michigan Avenue, Chicago 11, Illinois.

"Question: Would you be good enough to state your business or occupation?

"Answer: I am vice president, secretary and treasurer of the Market Research Corporation.

"Question: State if you will, please, Mr. Osborn, the nature of that organization.

"Answer: It is an organization engaged in marketing research.

* * * * * * *

[fol. 459] "Question: Now, your attorney has accepted for you a subpoena to produce certain documents, Mr. Osborn. Do you have those documents with you this morning?

"Answer: Yes, I do.

"Question: Do you have the report here?

"Answer: (Indicating the report.)

"Question: May I see the report itself?

"Answer: Yes."

Mr. Lamb goes on to state:

"As you know, this is the report which is entitled, 'M.R.C.A. Presentation to Pet-Ritz Foods, Division of Pet Milk Company, on Frozen Dessert Pies.' Is there going to be any question about our right to use the photostat at the trial?

"Mr. Lamb: There will be no question about it at all.

"Mr. Alioto: All right. On that basis we won't have to steal your file completely for the purpose of making a copy of it—with your attorneys' permission, of course—and we will leave it with you."

The report was then marked as an exhibit in that deposition and is presently Plaintiff's Exhibit 61 in this case.

• • • • • • •

"Question: Do you have with you, Mr. Osborn, all of the [fol. 460] underlying papers and supporting documents that were used in connection with the preparation of this report—

"Answer: Yes.

"Question: —which is Exhibit 1?

"Answer: Yes.

"Mr. Rieger: May I suggest that the witness explain more fully the documents he is producing, because I think you will understand that there are some other documents that are bulky that are involved. This involves the explanation pretty much of the procedure of our business.

"Question: Fine. Do you want to go ahead and simply explain anything about these documents you desire to say, Mr. Osborn?

"Answer: All right. These files which are for the most part machine tabulations are the ones that were processed in our tab department to produce this report. There are documents underlying this report.

"Mr. Rieger: Underlying the report.

"The Witness: (Continuing) Underlying the tabulations, yes, that I can best describe by explaining how our business operates.

"This report itself has been prepared from information obtained from the National Consumer Panel. The National Consumer Panel is a group of households or families scattered all over the United States that represent a sta-

tistical sample of the total population. These families send us a weekly report of their purchases at their grocery store. This report is in the form of a pre-printed 16-page diary booklet that is sent to them in advance. After they make their purchases at the grocery store and come home we teach them that before they put the food, the canned goods, away, they complete this report.

"These diaries are mailed to our company weekly. From the diary we prepare IBM punch cards. And the punch cards are then tabulated. And from these tabulations we prepare statistical reports.

"I am skipping a lot of steps in the process of these diaries. There is a step that involves coding the entry that the housewife puts in. If she makes a purchase of Del Monte peaches, we have a group of employees in our Chicago office that will translate the brand name 'Del Monte' into a numeric code. These diaries then go to the [fol. 461] key punch department for the preparation of the IBM punch cards.

"Question: Do you know, Mr. Osborn, approximately how many housewives there are in this council, this Consumers Council?

"Mr. Rieger: Panel.

"The Witness: In the Panel.

"Question: Yes. In the Panel?

"Answer: At the current time the number is some 9,000. At the time this report was prepared our sample was approximately 6,000.

"Question: How are those folks spread across the country geographically, if you can approximate it for us?

"Answer: Well, I am not a statistician, but it is on a random sampling basis. We have representatives in every state and, I believe, every country.

"Question: Would your records reveal or set out the diaries you received from all of your representatives in Utah, and in Idaho, and in Colorado, for example?

"Answer: It would probably be possible to select the ones by state. We don't normally report it this way. We consider the number is too small to be statistically sound. We have, I believe, six or seven geographic regions that we use.

"Question: Now, one of the geographic regions: For example there is set out on the various pages of the report which is Exhibit 1 in this deposition, a geographic region for Salt Lake. Do you have any notion as to what area is encompassed within that region?

"Answer: No, I am not familiar with it."

• • • • • • •

[fol. 462] "May we ask they be marked as Exhibit 2 . . ."

"Question: You have an item you are holding in your hand. Will you be good enough to tell us what that is?

"Answer: Yes, this is a letter from the Pet Milk Company that authorized the report, and the form attached is the service notice, which is an internal form in the company. That is the notice to the accounting department that a special job has been sold and it contains billing instructions.

"Question: Now, this letter you are speaking of, dated July 28, 1959, is from Mr. S. A. Robert, Jr., Market Research Director, Pet Milk Company, addressed to Mr. J. W. Woodlock of the Market Research Corporation of America.

"We will ask that be marked as Plaintiff's Exhibit next in order to be attached to the document you have described as an internal department service notice of Market Research Corporation of America."

Mr. Bertain: Excuse me.

Mr. Alioto: If your Honor please, I would like at this time to offer this document that is Plaintiff's Exhibit 61 as to all of the defendants. It has up to this time been offered only as against the Pet Milk Company. I think that deposition now gives a sufficient authentication of the manner in which this was compiled to offer the document as against all the others.

We can read many other portions of the deposition, but perhaps counsel, who have a copy of this deposition, may not think it necessary. In any event, we offer it in evidence against the other two defendants at this time.

Mr. Billings: Your Honor, it seems to me that this is a document which, according to the deposition and the exhibits, was ordered by the Pet Milk Company, and I assume that, as such it is admissible against them. But certainly, as to Carnation Company, it is wholly hearsay and, secondly, it is irrelevant and immaterial.

Mr. Schafer: I should like to say the same thing, your Honor. I am not concerned about how they it. I suppose they did it in a good way. But it has nothing to do with [fol. 463] the issues in this lawsuit. What we are charged with here is conspiracy to try to destroy this plaintiff. Now, this market share survey, or whatever it is—I don't know what you call it—a market presentation—this has absolutely nothing to do with that issue. Therefore we object on the grounds of hearsay.

* * * * * * *

[fol. 464] Mr. Alioto: * * * If your Honor please, if there is any question about this, I would like to make this suggestion: May I, instead of reading all of this foundation material to the jury, offer the entire deposition, and we can take up the question of its admissibility in the light of certain authorities which I will bring the Court on market surveys at some other juncture.

The Court: All right.

Mr. Alioto: May I offer, then, the entire deposition of Mr. Osborn as the plaintiff's exhibit next in order.

The Court: Received.